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THE LEGAL HISTORY OF TRADE UNIONISM

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THE LEGAL HISTORY OF TRADE UNIONISM

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PREFACE

THIS brief work seeks to trace the legal history of trade unionism down to modern times. In attempting this task, it is necessary to go as far back as the Elizabethan statutes relating to the regulation of wages and apprenticeship. The early gild regulations, and the customs to which they gave rise, exerted no small influence on the wage system in England. As the State regulation of wages and of the terms of apprenticeship was gradually discontinued, labour and capital became completely disorganised, and in an endeavour to remedy the position of labour, trade unions came into existence. The severe legal restraints to which the early trade unions were subjected will be apparent in the following pages ; at the present day, the pendulum has swung in the other direction, though many of the old prejudices still survive. Part I of this work traces the legal development down to the legislation of 1871. Part II attempts to give a brief outline of the modern law. Proposals have been made for further legislation, which will have the effect of modifying the Act of 1927. At the time of going to press, the matter has not been settled, but it is important that any project for the reform of Trade Union law should be considered in the light of the history which lies behind the modern position.

A word remains to be said as to the origin of this joint effort. The material was collected by Mr. Winterbottom whilst engaged on research for his Master's degree. Subsequently, this material was considerably re-cast and adapted for publication by Mr. Hedges and Mr. Winterbottom in collaboration. The authors desire to express their grateful appreciation to Professor R. A. Eastwood for kindly reading the whole of the proofs, and for many valuable suggestions.

R. Y. H.
A. W.

MANCHESTER,
February 1930.

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PART I

CHAPTER I

THE WAGE REGULATION AND APPRENTICESHIP LAWS

In the very early history of combinations of workmen, the Legislature from time to time sought to prohibit them, but almost invariably it dealt with individual trades, and it was not until near the close of the eighteenth century that the growth of trade clubs and societies assumed proportions such as called for general enactment. By that time, these organisations of workmen were beginning to exercise the functions which we, in modern times, associate with trade unions, and the newer industries such as cotton-weaving and coal-mining were absorbing an enormous number of operatives, whose conditions of labour, dependent as they were on new economic factors, were such as to create an atmosphere favourable to organisation on a wide scale. Consequently, in 1799 Parliament passed the first Combination Act.

At first sight, this would appear to be a convenient starting-point in the history of trade union law. But there are several considerations which compel one to take account of certain aspects of earlier law. The series of legislative enactments which commenced with the Act of 1799 was so intimately connected with the law as to combinations of workmen prior to that time, that the nature of the law before that statute must not be neglected. This earlier law rests partly on the principle, which has taken such a prominent position not only in the common law but also in political and economic controversy, that a trader has a right to the free and unobstructed management of his trade or business, and partly on the equally vague legal conceptions of criminal conspiracy which were fashioned by the courts during the eighteenth century. Both aspects of the law—restraint of trade and criminal conspiracy—are deserving of explanation, for trade union law, despite its frequent modification by statute law, has never to this day shaken itself free from the doctrines in which it originated. The law of torts, as it affects trade unions, can never be properly understood without a knowledge of the early case law on these doctrines. Moreover, something must be said of the Eliza-

bethan and later statutes which provided regulations for the assessment of wages by justices of the peace, and framed regulations for the apprenticeship of labour. An analysis of the two systems of wage and apprenticeship regulation, particularly of the former, is necessary, because their retention and renewed enforcement which was advocated early in the nineteenth century, by affording to the working classes machinery other than strikes and violence for the protection of their standard of life, might have profoundly altered the whole history of trade unionism.

Prior to the Black Death in 1348, such regulations as were to be found controlling wages and other conditions of labour existed only in the customs of the manors or the ordinances of the gilds.[1] That great pestilence, however, created a problem which called for national rather than local initiative for its solution, and it provided Edward III with an unique opportunity for launching his schemes for state interference with trade and industry. Within a very short time, the Ordinance of Labourers was issued.[2] It related almost wholly to agriculture, and adopted the policy of compelling men to work and settling what wages they should receive. Such wages only were to be paid as were customary in the places where they were employed in the twentieth year of Edward III's reign—the wages current before the Black Death should be adhered to. Penalties were imposed for disregard of these provisions.

There seems to have been a general lack of regard shown for this Ordinance, and consequently, the Statute of Labourers, 1351,[3] was passed. This statute, however, went further, and it not only fixed year and day wages for labourers in husbandry, but also for several kinds of artificers and other labourers.[4] It empowered justices to hold sessions four times a year and at "all times needful," in order to secure the due execution of the Act, and to ascertain the wages which were accustomed to be paid in 20 Ed. III. Artificers were to swear to use their craft as they did in that year under pain of "*fyn, ranceon et emprisonement selone la discretion des dites justices.*" [5]

In the succeeding years, several enactments were passed which confirmed and strengthened the enforcement of this statute.[6] When the price of victuals began to rise, however, on account of changes in

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[1] Cunningham, *Growth of English Industry and Commerce* (4th Edn.), Vol. 1, p. 329.

[2] 1349 or 1350, 23 Ed. III.

[3] 25 Ed. III, Stat. 1.

[4] Including carpenters, masons, tilers, plasterers, and "*autres overours des mures darzill et lours garceons.*"

[5] *Cap.* 4.

[6] *E.g.* 31 Ed. III, stat. 1, c. 6; 34 Ed. III, cc. 9–11; 42 Ed. III, c. 6; 7 Ric. II, c. 5; 12 Ric. II, cc. 3–5.

the value of money, the unfairness of retaining a wage level current in 1346 became apparent, and there was a growing demand for revision. Consequently a new principle was introduced in an Act of 1389,[1] which directed the justices in two of their sessions to make proclamations, "according to the dearth of victuals," denoting how much every labourer by the day should "take by the day with meat and drink or without meat and drink." From time to time further measures became necessary and were passed to extend the power of the justices to enforce the regulations.[2] Several attempts were also made to give the justices statutory authority to compel all able-bodied labourers, who were unable to maintain themselves, to work if requested to do so by an employer—a power retained as an essential part of the Elizabethan legislation. In addition, there was some fragmentary legislation designed to safeguard the journeyman against irregularity of employment.[3] From 1389 to 1562, the Legislature made no new provision for a sliding scale controlled by justices, but the earlier permissive Acts were not repealed.[4]

The object of Elizabeth's Parliament was to pursue to the farthest limits the policy of regulating "the *minutiæ* of industrial life of all kinds, according to the best type."[5] The years preceding 1562 were notable for the chaos into which the system had drifted, but the time was ripe for drastic action by the Legislature. This occurred with the passing of the Statute of Artificers, 1562.[6] The earlier statutes were repealed, but on the basis of those statutes provisions were enacted codifying and developing the existing law. According to the Preamble, it was the wish of the Legislature that the Statute would "banish idleness, advance husbandry, and yield unto the hired person, both in time of scarcity, and in time of plenty, a convenient proportion of wages." The provisions of the statute fall naturally into two sections—the wage clauses, and the apprenticeship clauses.

1. The Wage Clauses of the Statute of Artificers

The important part of the Statute 5 Eliz. c. 4 is Section 15, which provided that the justices should yearly, at every general sessions first after Easter, assemble together, and :

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[1] 13 Ric. II, c. 8.

[2] *E.g.* 2 Hen. VI, c. 14, empowered justices to punish servants, masons, carpenters, etc., for taking unreasonable wages. Cf. 6 Hen. VI, c. 3 ; 8 Hen. VI, c. 8 ; 23 Hen. VI, c. 12 ; 11 Hen. VII, c. 22 ; 12 Hen. VII, c. 3 ; 6 Hen. VIII, c. 3.

[3] *E.g.* 4 Hen. IV, c. 14 ; 3 & 4 Ed. VI, c. 22.

[4] Miss McArthur, *Eng. Hist. Rev.* 1894, Vol. 9, pp. 305–14 ; 1898, Vol. 13, pp. 299–302.

[5] Cunningham, *op. cit.*, Vol. 2, p. 26.

[6] 5 Eliz. c. 4.

> they calling unto them such discreet and grave persons as they shall think meet, and conferring together respecting the plenty or scarcity of the time and other circumstances necessarily to be considered, shall have authority to limit, rate and appoint the wages as well of such and so many of the said artificers, handicraftsmen, husbandmen, or any other labourer, servant or workman, whose wages in time past have been by any law or statute rated, as also of all others . . . which have not been rated, as they the same justices . . . shall think meet by their discretions to be rated. . . .

Unmistakeable as the meaning of this section seems to be, its operation between 1562 and 1604 presents much difficulty to the historian. Certainly our knowledge of the workings of the system is far from adequate, perhaps dangerously so. The orthodox attitude is to accept the implications of the preamble to 1 Jac. I, c. 6, which declared that :

> Whereas the said Act (5 Eliz. c. 4) hath not according to the true meaning thereof been duly put into execution, whereby the rates of wages for poor artificers, labourers and other persons, whose wages were meant to be rated by the said Act, have not been rated . . . which was politickly intended by the said Act, by reason that ambiguity and question have risen and been made, whether the rating of all manner of artificers, workmen and workwomen, his and their wages, other than such as by some statute and law have been rated, or else such as did work about husbandry, should or might be rated by the said law.

In other words, as Dr. Cunningham has said, the wage clauses of the Statute of Artificers were found to be unworkable in 1604, either because the required machinery could not be put in motion or because it had broken down after a trial.[1] It seems undoubtedly true that the system did not work as effectively as had been expected. Not many cases can be found in which the penalties prescribed by the statute were imposed for taking wages at rates higher than those fixed, or for the non-performance by the justices of their duties.

On the other hand, Miss McArthur's investigations of the London Records show that "during at least 21 out of the first 28 years after the passing of the Act, action was taken in accordance with the law," and it is suggested that state interference was even more common elsewhere, although the evidence as to the other towns is scanty.[2] Moreover, till 1597, the King in Council was empowered to supervise the publication of assessments, and according to the same learned writer, "in no way shirked its duty." In fact, proclamations apparently intended to have been of general application have been

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[1] *Economic Journal*, Vol. 4, p. 515.
[2] *English Historical Review* (1900), Vol. 15, p. 452.

found, and the Council was on occasions ready to intervene to compel justices to enforce the Act, and to compel masters to adhere to rates fixed. The evidence tends to show that assessments purporting to rest on 5 Eliz. c. 4 made no distinction between artisans of all kinds and labourers in husbandry. Strong as may have been the doubts mentioned in the preamble to 1 Jac. I, c. 6, it never operated as a general deterrent to justices from assessing the wages of artisans and craftsmen. Particularly was this so of the London assessments, which applied scarcely at all to agricultural workers.

From 1738 to 1811, there is no clear indication of assessments made or applied for, except under statutes relating to particular trades. The year 1811, however, is marked by the important case of *R.* v. *Justices of Kent.*[1] The case arose out of a petition by certain millers of Kent, asking for an assessment of their wages under 5 Eliz. c. 4. The justices refused to consider their petition on the ground that they had no jurisdiction under the statute with respect to the wages of millers or any workmen other than husbandmen. Their decision was based on a series of cases from *Snape* v. *Dowse*[2] to *R.* v. *Inhabitants of Hulcot.*[3] Lord Ellenborough evaded the question of whether 5 Eliz. c. 4, gave the justices authority, observing that it might have been doubtful under that statute, and applied the Statute of 1640, 16 Car. I, c. 4, s. 2. This later enactment, rendering permanent the Act 1 Jac. I, c. 6, provided that :

> the said statute, and the authority by the same statute given to any person or persons for assessing or rating of wages, and the authority to them in the said Act committed, shall be expounded and construed and shall by the force of this Act give authority to all persons having any such authority, to rate wages of any labourers, weavers, spinsters, and workmen and workwomen whatsoever.

The frequent references to 5 Eliz. c. 4 in assessments, even after 1604, would seem to imply that Lord Ellenborough would have been justified in holding that the justices had authority under that statute.[4] Nevertheless, the same result was achieved ; it was held that the justices had authority to assess the wages of millers, and consequently they had erred in refusing to hear the petition. The Court then went on to construe 1 Jac. I, c. 6, and in so doing left to the justices a loophole

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[1] 1811, 14 East, 395. [2] Carth. 156.

[3] 6 T. R. 583.

[4] *Eng. Hist. Rev.*, 1898, Vol. 13, pp. 91–93 (Miss Leonard) ; *ibid.* pp. 522–7 (J. C. Tingey) ; Cunningham, *op. cit.*, Vol. 3, Appendix A ; Thorold Rogers, *Hist. of Agriculture and Prices*, Vol. 7, p. 610 ; 1621 H. MSS. Commission, 12, Ap. 4 (460) ; *Economic Journal*, Vol. 4 (1894), p. 516 (Cunningham).

equally wide. Lord Ellenborough said that the Court did not at all interfere with the exercise of the discretion which the Legislature confided in the justices. They must hear the application, he said, but having heard it, it would rest entirely with them whether or not to act upon it.

A scrutiny of the little material available leads one to this conclusion : there was a difference between the justices' authority to fix wages and their authority to enforce payment of wages ; with regard to husbandry, they could rate wages and make a valid order for the payment of wages, which would be upheld by the central courts,[1] but in the case of other types of labour, they might at their discretion rate wages, but they could not secure the aid of the central courts in giving effect to them by orders.[2] Moreover, up to 1720, the courts were lenient in their scrutiny of orders, and justices, who desired to apply 5 Eliz. c. 4 to artisans other than husbandmen, might for a long time have evaded the strict law by returning a general order " for wages generally." [3]

The defects in the wage-regulating system are not difficult to discover. In the first place, few magistrates were prepared to perform their duties efficiently, and the central control which might have rectified this was not in evidence in the eighteenth century. Again, the discretionary character of the justices' authority enabled them to evade necessary alterations of wages, under colour of exercising their authority and finding no alterations necessary. It is not surprising that the working-classes sought other means of redress. They still realised the advantage of state regulation of wages, if properly conducted, and several statutes during the eighteenth century recognised the system in a few trades. Assessments under these statutes were made as late as 1801.[4] But apart from these new enactments, successive generations of workmen gradually forgot that the wage-regulating system was still in existence. The decision in *R.* v. *Justices of Kent* appears to have come as asurprise.[5] Two

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[1] See *e.g. R.* v. *Gouche* (1 Anne), 2 Ld. Raym. 820 ; 2 Salk. 441 ; *R.* v. *London*, 2 Salk. 443 ; 3 Salk. 262 ; 6 Mod. 206 ; *Gomersall* v. *Watkinson* (40 Eliz.), Moore K. B. 698.

[2] *Snape* v. *Dowse*, *R.* v. *Champion*, Carth. 156 ; *R.* v. *Corbett*, 3 Salk. 262. But cf. *Queen* v. *Dalloe*, Sess. Ca. 17, *per* Eyre, J., and *R.* v. *London*, 6 Mod. 206, *per* Holt, C.J.

[3] *R.* v. *Gouche ; R.* v. *London ; R.* v. *Gregory*, 2 Salk. 485. But cf. *R.* v. *Helling*, 1 Stra. 8, and *R.* v. *Inhabitants of Hulcot*, 6 T. R. 583.

[4] See Smart, *Economic Annals*, I, pp. 23, 369 ; Webb, *Trade Unionism* (1902 Edn.), pp. 49–63.

[5] See Viscount Sidmouth's speech in debate, *Cobbett's Parliamentary Debates*, Vol. 25, Col. 594, 1813.

years later the wage clauses of the Statute of Artificers were repealed.[1] The authority of justices to rate wages did not wholly disappear until the Combination Act of 1824 repealed several combination laws of the eighteenth century, which, while prohibiting combinations in certain trades, had empowered justices to rate wages in those trades. But after 1813 there was little likelihood that those powers would be exercised.

2. The Apprenticeship Clauses

The compulsory apprenticeship regulations contained in the Statute of Artificers were one phase of the Tudor policy of state interference. By Section 31, it was enacted that :

> it shall not be lawful to any person or persons, other than such as now do lawfully use or exercise any art, mystery, or manual occupation, to set up, occupy, use or exercise any craft, mystery or occupation, now used or occupied within the realm of England and Wales, except he shall have been brought up therein seven years at the least as an apprentice . . . nor to set any person on work in such mystery . . . being not a workman at this day, except he shall have been an apprentice, . . . or else having served as an apprentice, shall or will become a journeyman, or be hired by the year ; upon pain that every person willingly offending or doing the contrary, shall forfeit and lose for every default forty shillings for every month.

All indentures, covenants, promises and bargains which contravened any of the regulations were declared void.[2] Under a penalty of ten pounds for each default, masters were required to have at least one journeyman for every three apprentices.[3] Other sections defined the conditions on which various kinds of masters might take apprentices, and the manner of choosing them.[4]

There is little doubt that after 1600 the courts were definitely opposed to these restrictions on economic grounds. The strict way in which the statute was construed, however, is to be attributed in the main to the fact that it was partially overriding a leading principle of the common law that an individual is entitled to exercise any lawful trade and employ his labour in any lawful direction he may wish.[5]

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[1] By 53 Geo. III, c. 40, Parliament repealed the wage clauses of 5 Eliz. c. 4, the Stat. 1 Jac. I, c. 6, and certain Scottish Acts. The Act of 1640 was not mentioned.

[2] S. 41. [3] S. 33. [4] Ss. 25–30.

[5] Chitty, *Law relating to Apprentices and Journeymen*, London, 1812, p. 5. See Lord Mansfield's judgment in *Reynard* v. *Chase*, Burr. Rep. 6, Peake's cases, 148 ; *R.* v. *Chase*, 2 Wils. K. B. 41.

Several relaxations of the conditions of apprenticeship came to be permitted by the courts.[1]

The apprenticeship clauses were repealed in 1814.[2] It is not clear which sections of 5 Eliz. c. 4 were meant to be repealed, but it may be surmised that the apprenticeship clauses were repealed so far as their operation was penal and compulsory.

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[1] See *e.g.* *R.* v. *Coller*, 6 W. & M., Comb. 255 ; *R.* v. *Maddox*, 5 Anne, 2 Salk. 613 ; *Waller* v. *Holton*, 33 Geo. III, 1 Bla. 234 ; *R.* v. *Moor & Dibloe*, 26 Car. II, 3 Keble, 400 ; *Reg.* v. *Morgan*, 10 Anne, 10 Mod. 70 ; note to *R.* v. *Kindersley*, 1 Saund. 312 ; *Hobbs* v. *Young*, 3 Mod. 313 ; *White* v. *England*, 4 Mod. 145.

[2] 54 Geo. III, c. 96.

CHAPTER II

THE LAW RELATING TO COMBINATIONS BEFORE 1799

The object of many of the combinations of workmen during the eighteenth century appears to have been the enforcement either of the apprenticeship laws or of the wage-regulation statutes. It may safely be said that there are no records of convictions before 1813 relating purely to combinations designed to achieve either of these objects. One explanation may have been that frequently the more humane section of employers connived at or even supported associations which sought to attain those objects, but apart from that, there is evidence that unless illegal acts, such as the employment of violence, were committed, there was no illegality in the combinations themselves, at any rate in criminal law, since they were merely intended to secure the enforcement of the existing law. With regard to associations to enforce the wage-regulation statutes, it has been pointed out that although technically they were within the definition of combination and conspiracy, yet no case is known in which they were indicted as illegal. It is more likely that they were not illegal, because they had as an object the execution of statute law.[1] Indeed, combinations of this nature were sometimes spoken of with favour by the courts. Thus, in 1772, when the tailors of London, who were notoriously given to striking, petitioned the City magistrates to increase their wages, the justices intimated that "they received the applause of the court for the propriety of their behaviour in securing redress in a legal manner without having recourse to violent methods."[2]

On the other hand, there were some combinations of workmen which had for their object the improvement of wages or other conditions of employment without any appeal to statute law. As to such concerted action, there was no general immunity before 1799, and both the common law and statute law marshalled their strength in an attempt to prohibit combinations of this kind. Certainly there were two different grounds on which combinations

[1] S. and B. Webb, *History of Trade Unionism*, p. 65.
[2] Galton, *Tailoring Trade*, p. *l.*

of workmen might be held to be criminal. First, the conviction might rest on some statute which prohibited combinations of workmen either generally or in a certain trade or trades. And secondly, the combination might come within the description of common law conspiracy, on the ground that it was a combination to infringe some statute prohibiting combinations.

The statutory prohibition of combinations of workmen is of very early origin, but the isolated instances up to the sixteenth century are comparatively unimportant.[1] The first really all-inclusive enactment appeared in 1548, and is generally known as the Bill of Conspiracies of Victuallers and Craftsmen.[2] It provided that :

> if any artificers, workmen, or labourers do conspire, covenant or promise together, or make any oaths, that they shall not make or do their work but at a certain price or rate, or shall not enterprise or take upon them to finish that another hath begun, or shall do but a certain work in a day, or shall not work but at certain hours and times,

they should be liable to incur certain penalties on conviction ; viz. for a first offence, £10, or in default of payment, twenty days' imprisonment on bread and water ; for a second offence, £20, or in default of payment, the pillory ; for a third offence, £40, or in default of payment, the pillory and loss of an ear ; and at all times after that, should be " taken as men infamous." This statute was affirmed in 1670,[3] and there is evidence of its having been applied in some of the proclamations of assessments of wages during the early eighteenth century, notably when wages were fixed by the Lancashire justices in 1725.[4] The practice of passing statutes prohibiting combinations in particular trades was more frequently resorted to after 1700. Until near the end of the eighteenth century, such a statute, as a rule, would assess wages and sometimes the hours of labour in the particular trade, and expressly declare void and illegal and penalise all agreements or combinations which should aim at violating those terms.[5]

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[1] Cunningham, *op. cit.*, Vol. 1, p. 339, citing *Liber Cust.* ii, 540 ; Statutes 34 Edw. III, cc. 9–11 ; 42 Edw. III, c. 6 ; 13 Ric. II, cc. 8, 13 ; 4 Hen. IV, c. 14 ; 7 Hen. IV, c. 17 ; 2 Hen. V, stat. 2, c. 2 ; 2 Hen. VI, c. 14 ; 3 Hen. VI, c. 1 ; 6 Hen. VI, c. 3 ; 8 Hen. VI, c. 8 ; 4 Hen. VIII, c. 5 ; 6 Hen. VIII, c. 3 ; 3 & 4 Edw. VI, c. 22.

[2] 2 & 3 Edw. VI, c. 15. F. D. Longe, *Law of Strikes*, 1860, p. 8, describes it as " the only general statute until the Combination Act of 1799."

[3] 22 & 23 Car. II, c. 19.

[4] See Cunningham, *op. cit.*, Vol. 3, Appendix A, p. 897.

[5] The tailoring trade of Westminster was governed by 7 Geo. I, c. 13, and later by 8 Geo. III, c. 17 ; woollen-weavers were affected by 12 Geo. I, c. 34, 29 Geo. II, c. 33, and 30 Geo. II, c. 12 ; silk-workers by 13 Geo. III, c. 68, extended by

Prosecutions against combinations in trades affected by these Acts might have been founded either on the statutory offence, or on the common law offence of conspiracy to infringe the statute. Our knowledge of such prosecutions, however, is very limited, and although journals and documents disclose numerous instances of convictions for conspiracy, the reported judgments are not sufficiently lucid to explain the true nature of the finding. The annals of the tailoring trade in London contain references to prosecutions, brought or contemplated. Thus, in 1744, prosecutions were said to be pending in the King's Bench, but no further information about them has been found. Again, at a later date, the London masters were said to have been deterred from prosecuting the workmen's combinations by threats of counter-prosecutions by the workmen against the masters for paying wages above the rates assessed by the justices.[1]

From some of the judgments prior to 1800, the theory has been put forward that all combinations, whether of masters or of workmen, to raise or lower wages or alter the conditions of labour, were criminal at common law, apart from statute or the offence of conspiracy to infringe a statute. This view was generally accepted as correct at the time when the Combination Acts of 1824 and 1825 were passed. Indeed, the theory has much to support it; of the cases reported before 1800, three seem to support it, and in none of the others can any contradiction of it be found. These decisions are *R.* v. *Journeymen Tailors of Cambridge*,[2] *R.* v. *Eccles*,[3] and *R.* v. *Mawbey*.[4] In all these cases, however, the decisions are capable of other explanations, and the evidence in support of the theory would appear to be inadequate. For an explanation of this, it is necessary to trace briefly the law of criminal conspiracy up to 1800.

The better opinion is that the crime of conspiracy in English law originated in statute law, and in particular in the Ordinances and

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32 Geo. III, c. 44; the hat trade by 22 Geo. II, c. 27, and 17 Geo. III, c. 55; and paper manufacturers by 36 Geo. III, c. 111. See also 20 Geo. II, c. 19, which seems to embrace a great number of trades.

[1] These are typical illustrations of the material available. Wentworth cites a precedent of an indictment charging journeymen tailors with conspiracy to raise their wages and lessen the time of their working, contrary to the order of the justices and the statute. The indictment mentions an assessment by the Recorder and Aldermen of London. There is little doubt that this was based on the Act of 1720 or that of 1768 for the tailoring trade (Wentworth, *System of Pleading*, Vol. 4, p. 103). Other precedents which refer to "usual" hours or wages would seem to be founded on some statute (*ibid.* Vol. 6, pp. 113, 120). See *R.* v. *Hammond and Webb*, 1799, 2 Esp. 719, *per* Lord Kenyon.

[2] 8 Mod. 10.

[3] 1 Leach 274.

[4] 1796, 6 T. R. 619.

Statute of Conspirators, viz. *Statutum de Conspiratoribus, De Conspiratoribus Ordinatio*, 1293;[1] *Articuli super Cartas*, 1300,[2] and *Ordinatio de Conspiratoribus*, 1305.[3] Under these statutes, a conspiracy strictly so-called was regarded (in the terms of Coke's definition) as "a consultation and agreement between two or more, to appeal or indict an innocent falsely and maliciously of felony, whom accordingly they cause to be indicted and appealed, and afterwards the party is lawfully acquitted by the verdict of twelve men."[4]

The rapid growth of the law of conspiracy in modern times dates from the decision of Coke, C.J., in *The Poulterers' Case* in 1611.[5] The proposition was put forward that the offence of conspiracy might be committed by the mere act of combination falsely to bring an indictment, although no further steps were taken to effect the objects of the combination. The argument was that there was a criminal intention coupled with an act (*i.e.* the agreement) done in furtherance of it. The offence so defined was not to be considered as an offence within the ancient statutes, but rather as an offence against the common law. Here we have the germ from which the modern conception of conspiracy has developed. During the next hundred years a remarkable extension took place in the meaning of conspiracy; partly this came about by a tendency to relax the strict definition laid down in 1611, yet a certain element of perversion of justice was still necessary to the offence. Thus, in *R.* v. *Best*, 1705,[6] it was held that an agreement falsely to charge a man with what amounted to an offence by the spiritual laws, even though it did not offend against temporal laws, was indictable. Then again, a general rule was evolved (generally termed the "seventeenth century rule") to the effect that a combination to commit *any* crime is a criminal conspiracy. "The general criminal law had received great extensions, first at the hands of the Star Chamber, next from the Court of Exchequer. . . . The procedure by indictment for conspiracy was, during the eighteenth century, applied to combinations for a great variety of purposes made criminal by these extensions. In certain cases, after the ordinary criminal law receded from a portion of the wide area over which it has thus claimed jurisdiction during the seventeenth century, the law of conspiracy continued to be applied to combinations for purposes which had ceased to be criminal by the ordinary law."[7]

These further developments had the effect of rendering the whole

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[1] 21 Edw. I. [2] 28 Edw. I, stat. 3, c. 10.
[3] 33 Edw. I, stat. 2. [4] 3 Inst. 142–3.
[5] 9 Rep. 55. Earlier cases: Anon. 1354, 27 Ass. 138, pl. 44; *Sydenham* v. *Keilaway*, Cro. Jac. 8.
[6] 2 Ld. Raym. 1167; 1 Salk. 174; 6 Mod. 185.
[7] Wright, *Law of Criminal Conspiracies*, pp. 8–9.

subject of criminal conspiracy decidedly obscure. Perhaps from the analogy of combinations to cheat or defraud,[1] many combinations came to be regarded as criminal, although the acts which were the objects of the combination did not involve anything which would have been criminal or even actionable if performed by an individual or by individuals without combination. The earliest case indicating a reaction against the "seventeenth century rule" was *R.* v. *Starling* in 1665.[2] In that case certain London brewers were convicted for conspiracy to impoverish the excise farmers. The real ground of the decision was the injury caused to the King's revenue, but the case seems to have been the foundation of many of the later extensions of the meaning of conspiracy. It was cited by Hawkins in 1717, and it gives some semblance of authority to his assertion that "there can be no doubt but that all confederacies whatsoever, wrongfully to prejudice a third person are highly criminal at common law."[3]

This proposition and the judgment in *R.* v. *Starling*, as developed in later decisions, gave rise to the theory, already alluded to,[4] that combinations to raise wages were criminal conspiracies at common law. The usual explanation of the theory rests on an alleged principle of the common law that a conspiracy to injure another was criminal. It is now generally admitted that *R.* v. *Starling* does not support this proposition. There the agreement amounted to a conspiracy to deprive the King of his revenue, and the gist of the offence was its influence on the public.[5] In later cases, however, combinations to raise wages appear to have been construed in the light of Hawkins' unhappy generalisation. In *R.* v. *Journeymen Tailors of Cambridge*,[6] a number of tailors were indicted and convicted for conspiracy to raise their wages. The judgment leaves it doubtful whether the court thought there was a conspiracy to violate some statute, or decided the case on the authority of *R.* v. *Starling* alone. The court said that "a conspiracy of any kind is illegal, although the matter about which they conspired might have been lawful for them, or any of them, to do, if they had not conspired to do it, as appears in the case of the Tubwomen and the Brewers of London" (*i.e. R.* v. *Starling*). The case of *R.* v. *Eccles* [7] is likewise inconclusive. The quaint language of the courts merely charged (*a*) a conspiracy to impoverish H. B. in his business, and (*b*) a conspiracy to prevent

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[1] *R.* v. *Wheatley*, 1761, 2 Burr. 1127.
[2] 1 Sid. 174; 1 Keb. 650, 655.
[3] Pleas of the Crown, I, 72.2.
[4] P. 13, *supra*.
[5] See Holt, C.J., in *R.* v. *Daniell*, 1704, 6 Mod. 99.
[6] 1721, 8 Mod. 10.
[7] 1783, 1 Leach 274.

H. B. from exercising his trade. No statute was referred to. Lord Mansfield seems to have decided the case on the authority of *R.* v. *Starling* and *R.* v. *Tailors of Cambridge*. He said :

> The illegal combination is the gist of the offence ; persons in possession of any articles of trade may sell them at such prices as they individually may please ; but if they confederate and agree not to sell them under certain prices, it is conspiracy ; so every man may work at what price he pleases, but a combination not to work under certain prices is an indictable offence.

There is no case in the eighteenth century of a conviction at common law for conspiring not to sell goods under certain prices apart from the host of statutes on the subject. It has been suggested that the combination in *R.* v. *Eccles* may have been treated as a conspiracy to disturb prices, and as such, a conspiracy to do an act criminal even if done by one person as being in violation of some statute. It is more reasonable to infer, however, that Lord Mansfield had in mind the case of the Tailors of Cambridge.[1] The same may be said of *R.* v. *Mawbey*,[2] in which Grose, J., said :

> In many cases an agreement to do a certain thing has been considered as the subject of an indictment for a conspiracy, though the same act, if done separately by each individual, without any agreement among themselves, would not have been illegal. As in the case of journeymen conspiring to raise their wages, each may insist on raising his wages, if he can, but if several meet for the same purpose, it is illegal, and the parties may be indicted for a conspiracy.[3]

In the arguments of counsel, reference was made to the cases already cited, and it may be surmised that the dicta of Grose, J., were founded on those precedents. But as an authority the case has little weight. The issue was whether a conspiracy by justices of the peace to pervert the course of justice by producing in evidence a false certificate as to the condition of a road was or was not a crime. This and other cases established that a conspiracy to obstruct or pervert the administration of justice may be criminal. Consequently the *dicta* cited must be regarded as *obiter*.

Such precedents relative to this topic as may be found in the books of the period lead to no definite conclusion. The following examples are taken from Wentworth :

(*a*) An indictment for conspiracy by journeymen tailors to raise their wages and lessen the time of working, contrary to the order of the justices and the statute (probably referring to 8 Geo. III, c. 17).[4]

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[1] Wright, *op. cit.*, p. 45.
[2] 1796, 6 T. R. 619.
[3] 1796, 6 T. R. at p. 636.
[4] *System of Pleading*, Vol. 4, p. 103.

(*b*) An indictment for a conspiracy by journeymen smiths to lessen the time of working by refusing to work. No statute is mentioned, but reference is made to the "usual day's work." [1]

(*c*) An indictment for a conspiracy by journeymen lamplighters to raise their wages, not being content to work at the usual rates. This reference to the "usual rates" suggests that the rates had been fixed by justices under some statute.[2]

No definite conclusion can safely be drawn from those precedents which do not refer to any statute. Other precedents from various works, however, purport to be based on indictments for common law offences.[3] Chitty, for example, gives a precedent for an indictment at common law for a conspiracy among certain wheelwrights to raise their wages and lessen the time of labour. A note explains that by concluding "contrary to the form of the statute," the indictment would be good under 2 & 3 Edw. VI, c. 15.[4] It may be assumed that such indictments at common law were for conspiracies to infringe that statute, and that in the indictment at common law, there was no need to insert the words "contrary to the form of the statute." The absence of those words, or of any other reference to a statute in the precedents cited from Wentworth, does not prove that they were not based on conspiracies to infringe a statute. It is not improbable that all these precedents, like the one from Chitty, were based on 2 & 3 Edw. VI, c. 15. Apart from the cases and precedents cited above, there are singularly few indications, before 1800, of any general principle that a conspiracy to injure another would be an indictable offence.[5]

The theory that at common law a combination to raise wages was criminal is not upheld by reliable authority. The courts, especially after 1700, regarded nearly all combinations with such antipathy that they gradually extended the scope of the crime of conspiracy to unnatural limits, regardless of consistency. A combination usually gives to a meditated act a greater element of danger, and the courts were only too ready to hold as criminal any combinations whose activities affected the public. It would have been preferable

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[1] *Ibid.* p. 113.

[2] *Ibid.* Vol. 6, p. 375. Precedents not referring to any statute are also to be found in Dickenson, *Quarter Sessions* (*e.g.* pp. 283, 341). See also, Starkie, *Criminal Pleading*, 1822, Vol. 2, pp. 707, 742; Chitty, *Criminal Law*, 1826, Vol. 3, pp. 1165, 1167.

[3] *E.g.* Chitty, *op. cit.*, Starkie, *op. cit.*, *Crown Circuit Companion* (1820), 145.

[4] *Op. cit.* Vol. 3, p. 1163. The same note is to be found in Starkie.

[5] Of the theatrical cases, sometimes cited in support, only *R.* v. *Leigh* (1775), 1 C. & K. 28, was decided before 1800, and this case has earned little support for such a principle. See Wright, *op. cit.* p. 39; Harrison, *Law of Conspiracy*, pp. 30, 118.

to have subjected combinations to raise wages to the inquiry whether they employed unlawful means or coercion in achieving their object. The decisions are few, and they disclose no satisfactory explanation of the theory on which they rested. Nevertheless the theory that combinations to raise wages were criminal at common law appears to have been generally accepted in the years immediately preceding 1799.

CHAPTER III

THE COMBINATION ACTS OF 1799 *AND* 1800

THE breakdown of the Elizabethan statutory restrictions on the freedom of trade was mainly attributable to changed economic circumstances and the development of new theories. The new organisation of industry and the teachings of Adam Smith both facilitated the acceptance of the principle that wages and conditions of labour should be determined by the free negotiation of masters and workmen, and by the supply of and demand for labour in the industrial market. There was nothing in the new doctrines which made any distinction between individual and collective bargaining so long as there was no employment of coercion. The incapacity of individuals to bargain successfully with their masters clearly left no alternative but concerted action, and one might have expected that the law would have recognised this. On the contrary, however, not only did combinations remain illegal, but actually they were much more ruthlessly suppressed.

Three factors perhaps explain the continuance of their illegality. In the first place, the influence of the French Revolution on legislative public opinion in this country operated to clothe a workmen's association with much of the appearance of a political offence bordering on sedition. The industrial unrest in the country was readily regarded as inspired by the corresponding societies and political movements which advocated reform and threatened the stability of the interests of the landed and financier classes. Secondly, it was believed that since combinations were a general evil, the time was ripe for the application of a general remedy. A partial remedy was all that the existing law provided. Such statutes as there were did not apply to all trades ; in particular, they had no application to the great industries of the North. Moreover, the public generally complained of the ineffectiveness of the existing law and the flagrancy of the violations committed.[1] Thirdly, politicians whose thoughts penetrated more deeply than did those of the merely panic-stricken anti-Jacobins no

[1] See, *e.g.* the history of the operation in London of the Tailoring Acts of 1720 and 1768, in Galton, *Tailoring Trade*.

doubt had definite theories by which to justify the Acts of 1799 and 1800. Magistrates and judges frequently argued that united attempts to compel masters to concede higher wages or better conditions involved a direct interference with the right of the employer to conduct his business in his own way, and that such interference was dangerously injurious to the growing industrial and mercantile interests of the country, and consequently should be vetoed by the state. Parliament in effect accepted the contention of the manufacturing classes that trade could only flourish if there was tranquillity and freedom of management.

Assuming that the illegality of combinations should be maintained, Parliament could scarcely remain satisfied with the existing laws, the operation of which had on the whole been a dismal failure. Combinations were no longer of a transitory nature, for many had acquired elements of permanence, and had come to realise the possibilities of such new practices as picketing, large-scale intimidation, the accumulation of union funds, and inter-union aid.[1]

The purpose of the Combination Acts may be very simply stated. They were intended to render criminal all combinations of workmen, whether ephemeral or permanent, which were formed with the object of securing any improvement in the conditions of labour or of promoting anything which it was in the workmen's interest to obtain. The primary design, if not the practical result, of the Acts was to permit the individual workman to demand what wages or make what stipulations he thought fit, and work for whichever master he desired, but any move towards combination for any purpose relating to the employment of those combining was to be visited with penalties as a crime. The Acts, then, prescribed a general law, rendering criminal all trade unions and strikes, applying to all workmen in all trades, and the detailed wording revealed a determination to leave no loophole whereby workmen might escape punishment.

The Combination Act, 1799,[2] was repealed by the Combination Act, 1800.[3] The first sections of the latter Act relate to combinations of workmen. Section 1 enacted that :

> All contracts, covenants, and agreements whatsoever, in writing or not in writing, at any time or times heretofore made or entered into, by or between any journeymen manufacturers or other persons within this kingdom :
>
> (*a*) for obtaining an advance of wages of them or any of them, or any other journeymen manufacturers, or workmen, or other persons in any manufacture, trade or business, or

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[1] See the petition from certain master millwrights in 1799, *H. C. Journal*, April 5, 1799.

[2] 39 Geo. III, c. 81.

[3] 39 & 40 Geo. III, c. 106.

(*b*) for lessening or altering their or any of their usual hours or times of working, or

(*c*) for decreasing the quantity of work (save and except any contract made or to be made between any master and his journeyman or manufacturer for or on account of the work or service of such journeyman or manufacturer with whom such contract may be made),[1] or

(*d*) for preventing or hindering any person or persons from employing whomsoever he, or she or they should think proper to employ in his, her or their manufacture, trade or business, or

(*e*) for controlling or in any way affecting any person or persons carrying on any manufacture, trade or business, in the conduct or management thereof,

should be illegal, null and void, to all intents and purposes whatsoever.

It should be noticed that persons other than workmen, who joined any combination within the meaning of this section, were referred to, and that the section declared illegal and void an agreement for the obtaining of an advance of wages or other advantages for persons other than the parties to the agreement. Section 2 laid down the penalties which would be incurred by any person who should commit any offence under the preceding section.[2]

Section 4 provided that :

every person (whether employed in any manufacture, trade or business, or not) who should attend any meeting had or held for the purpose of making or entering into any contract, covenant, or agreement by the Act declared to be illegal, or of entering into, supporting, maintaining, continuing or carrying on any combination for any purpose by the Act declared to be illegal, or who should summon, give notice to, call upon, persuade, entice, solicit, or by intimidation or any other means endeavour to induce any journeyman, workman or other person employed in any manufacture, trade or business to attend any such meeting, or who should collect, demand, ask, or receive any sum of money from any such journeyman, workman or other person, for any purpose by the Act declared to be illegal, or who should persuade, entice, solicit, or by intimidation or any other means endeavour to induce any such journeyman, workman or other person to enter into or be concerned in any such combination, or who should pay any sum of money, or make or enter into any subscription or contribution, for or towards the support or encouragement of any such illegal meeting or combination, should, on conviction for any of these offences incur certain penalties.[3]

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[1] The words in brackets were inserted in the Act of 1800 as a modification of the repealed Act, no doubt with the intention of leaving the individual workman free to negotiate with his master.

[2] See *post*, p. 28.

[3] See *post*, p. 28.

Other offences were created by Section 3, which enacted that :

every journeyman, or workman, or other person, who should enter into any combination to obtain an advance of wages, or to lessen or alter the hours or duration of the time of working ; or to decrease the quantity of work, or for any other purpose contrary to the Act ; or who should by giving money, or by persuasion, solicitation, or intimidation or any other means, wilfully and maliciously [1] endeavour to prevent any unhired or unemployed journeyman or workman, or other person, in any manufacture, trade or business, or any other person wanting employment therein, from hiring himself to any manufacturer or tradesman or person conducting any manufacture, trade or business ; or who should, for the purpose of obtaining an advance of wages, or for any other purpose contrary to the provisions of the Act, wilfully and maliciously [1] decoy, persuade, solicit, intimidate, influence or prevail, or attempt or endeavour to prevail, on any journeyman, or workman, or other person hired or employed in any such manufacture, trade, or business, to quit or leave his work, service or employment ; or who should wilfully and maliciously [1] hinder or prevent any manufacturer or other person from employing in his manufacture, trade or business, such journeymen, workmen, and other persons as he should think proper, or who, being hired or employed, should *without any just or reasonable excuse*, refuse to work with any other journeyman or workman hired or employed to work therein, should on conviction for any of these offences incur certain penalties.

By Section 5 it was enacted that :

no person (whether employed as a journeyman or workman in any manufacture, trade or business, or not) should at any time after the passing of the Act, wilfully [2] pay or give any sum of money as a subscription or contribution for the purpose of paying expenses incurred or to be incurred by any person or persons acting contrary to the provisions of the Act ; or by payment of money or other means support or maintain any journeyman or other person, or contribute towards his support or maintenance, for the purpose of inducing him to refuse to work, or to be hired or employed in any manufacture, trade or business, on pain of incurring certain penalties ; and every journeyman and other person who should collect or receive any money or valuable thing for any of the purposes mentioned, should incur certain penalties.

As to funds already contributed, Section 6 provided that :

all sums of money which at any time before the coming into operation of the Act had been paid or given as a subscription or contribution for or towards any of the purposes prohibited by the Act, and should, for the space of three calendar months next after the passing of the Act, remain

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[1] " Wilfully and maliciously " supplanted " directly or indirectly " in the repealed Act. The change worked no apparent advantage.

[2] " Wilfully " is not in Section 5 of the 1799 Act.

undivided in the hands of any treasurer, collector, receiver, trustee, agent or other person, or placed out at interest, and all sums of money which should at any time after the passing of the Act, be paid or given as a subscription or contribution for or towards any of the purposes prohibited by the Act, should be forfeited, one moiety thereof to His Majesty, and one moiety to such person as should sue for the same in any of His Majesty's Courts of Record at Westminster; and any treasurer, collector, or other person, in whose hands or in whose name any sum of money should be, or should be placed out, or unto whom the same should have been paid or given, should and might be sued for the same as forfeited as aforesaid.

The Act was in no way intended to override the regulations which previous statutes had provided for particular trades. By Section 14 it was provided that nothing in the Act should extend or be construed to extend, to repeal or abridge the powers of any justice of the peace by statute, touching any combination of workmen, or for settling and adjusting disputes or the rate or amount of wages or mode or time of working or quantity of work. By Section 15, the Act of 1800 seems to have struck a severe blow at the apprenticeship provisions of the Statute of Artificers, and at similar regulations provided in other statutes, by giving sanction to the employment of unqualified workmen in certain circumstances. The effect of the Section seems to have been to permit a justice of the peace to decide what was a reasonable wage, and to enable the justice to waive the statutory restrictions on the entry of labour and license the engagement of "unqualified" men, if any workman refused to work at that rate, or if any workman, in the opinion of the justice, had been guilty of misconduct such as refusing to work with any other man or for any particular master, or refusing to work at all.

It must be borne in mind that this legislation was induced largely by the belief that combinations within the State, and especially combinations with regard to trade and industry, were undesirable, for it was this belief which inspired one section of the Act of 1800 which is too often disregarded. Combinations of masters were not left unshackled. By Section 17 it was provided that all contracts and agreements, whether in writing or not, between any masters or other persons, for reducing the wages of workmen, for adding to or altering the usual hours or time of working, or for increasing the quantity of work, should be illegal and void, and certain penalties were prescribed for such offences.

The really constructive feature of the Act was the provision of machinery for the settlement of disputes between masters and workmen by arbitration. This was the purpose of Sections 18–22,[1] the

[1] Similar provisions for the cotton trade in the Arbitration Act, 39 & 40 Geo. III, c. 90, just previously passed are repeated almost *verbatim*.

principal provisions of which may be summarised. If the arbitrators, in a dispute between masters and workmen, failed to decide the matter within three days of its submission, either party might require them to go before a justice of the peace and state the points in difference, and the justice should finally decide the same. The time within which an award must be made might be extended by agreement between the parties. If one party refused to sign the submission and to appoint an arbitrator, when the other party had done so, he could on conviction thereof be required to forfeit ten pounds, which might be levied by distress, and in default of payment he might be committed to gaol for three months or not less than two. If either party failed to perform what was directed by the award, he might be committed until performance. This machinery never worked really satisfactorily.

Procedure and Penalties

Perhaps the most noteworthy change in the combination laws effected by the legislation of 1799 and 1800 lay in the substitution of a general system of trial of offences against the Acts by courts of summary jurisdiction for a system under which only a limited proportion of cases could be so tried.[1] The new scheme of procedure devised by Parliament may be considered under various heads.

(*a*) *Trial.*—The Act of 1799[2] provided that any workman convicted of an offence under the Act upon his own confession, or the oath or oaths of one or more credible witnesses, before any one or more justices of the county (or other district) where the offence was committed, should be liable to incur certain penalties. In consequence of much agitation, the Act of 1800[3] required that there should be two justices instead of "one or more," and it also provided[4] that no justice of the peace being also a master in the particular trade or manufacture in or concerning which any offence was charged to have been committed under the Act, should act as a justice under the Act. This summary procedure under the Act was very unpopular; it was felt that the Act had erred in giving excessive scope to partisan forces, and frequent complaints were brought against the magistracy. Justices of the peace were appointed and displaced at the pleasure of the Ministers of the Crown, and were chosen almost exclusively from the landowning and merchant classes. At this time, the magistracy

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[1] *E.g.* the Act of 1720 for the London tailoring trade required for a conviction the evidence on oath of one or more credible witnesses before any two justices within the territorial limits governed by the Act. See *H. C. Journal*, April 5, 1799, for petition of certain master millwrights, which sets out the procedural weaknesses of the law before 1799.

[2] S. 2. [3] S. 2. [4] S. 16.

in many parts had earned a reputation for giving rein to base motives, which the existing state of the law encouraged.[1] The likelihood of bias was increased by the provision that offences against the Combination Act should be tried in the district where they were committed.[2]

(*b*) *Appeals.*—These provisions had the effect of depriving the workmen of the right of trial by jury, which in one petition was described as the "grand palladium of English liberty."[3] Moreover, there was no unrestricted right of appeal to compensate for this loss. The Act of 1800 provided[4] that appeal should lie from the justices to the General or General Quarter Sessions, and that the execution of every judgment so appealed from should be suspended, in case the person so convicted should immediately enter into recognizance before such justices, himself in the penalty of £10, with two sufficient sureties in the penalty of £5 each, upon condition to prosecute such appeal with effect at the next General or General Quarter Sessions, the judgment in the latter to be final. If the appellant lost, he had to pay the forfeiture or penalty (if any) mentioned in the conviction of the lower court, and such costs as appeared just and reasonable to the Court, and should be committed for any term of imprisonment therein stated.[5]

The right of appeal conceded by the Act was on the face of it of little utility. The sureties required, apart from the costs of appealing, were such as few working men could produce. Nevertheless, there is evidence that the devices and craft of the workmen did occasionally enable defendants to appeal against their convictions. Subscriptions, raised in apparent defiance of their illegality under Section 5, were in many cases forthcoming from individuals, and sometimes from societies performing the functions of friendly societies, as well as from actual trade unions. In the few instances traceable of cases being

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[1] Avarice and self-interest were nurtured by the practice of awarding blood-money. See J. L. and B. Hammond, *Town Labourer*, p. 78; Lord Brougham's Speech on the State of the Law, *Speeches*, ii, 376 (1828).

[2] *Town Labourer*, pp. 64–5.

[3] *H. C. Journal*, July 21, 1800.

[4] S. 23; cf. s. 14 of the 1799 Act.

[5] The hardship imposed on accused persons by their having to find such sureties, in addition to bearing the costs of appeal, was heightened by s. 5, which imposed a fine of £10 on any person who should pay, and a fine of £5 on any person who should receive, any sum or sums of money or valuable thing as a subscription or contribution for the purpose of paying any expenses incurred by any person acting contrary to the Act. The Act of 1799, s. 13, provided that no writ of *certiorari* should be granted to remove any conviction or other proceeding in pursuance of the Act; the Act of 1800 omitted this provision, but the decision of Quarter Sessions was declared to be final.

carried forward to Quarter Sessions, the success which attended the appeals was remarkable.[1]

(*c*) *Mode of Procuring Evidence.*—The clauses of the Act relating to the procurement of evidence were designed to meet an obvious difficulty caused by the secrecy on the part of offenders and sympathisers in respect of individual or collective culpability.

Section 7 provided that :

> any person who should be liable by virtue of the Act to be sued for any sums of money paid or given by way of subscription or contribution for any purpose prohibited by the Act, should be obliged and compellable to answer upon oath to any information which might be preferred against him in any Court of Equity, by or in the name of the Attorney-General on the part of His Majesty, or at the relation of any informer, for discovering the sum or sums of money so paid or given, and such court should and might make such orders and decrees therein as to such court should seem just, and no person should demur to or refuse to answer such information by reason of any penalty or forfeiture to which such persons might be liable in consequence of any discovery which might be sought thereby.

This section was subject, however, to a limitation contained in Section 8, which provided that :

> upon payment into the Court in which such information should be filed, of all moneys paid or given unto such treasurer or other person, for any of the prohibited purposes, and remaining in his hands at the time of the filing of such information, and upon making a full discovery of all the securities in or upon which all such moneys which should not be so remaining in his hands should have been placed out or invested, the person paying such moneys into Court and making such discovery, should be acquitted and discharged from all forfeitures and penalties incurred by him by reason of having collected or received such moneys, and from all actions and other suits respecting the same ; nor should any such person be liable to any forfeiture or penalty or to any prosecution in respect of any moneys which such person should discover to have been paid or received or given by any answer to any such information as aforesaid.

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[1] In some cases convictions were quashed on appeal on account of technical or formal defects, as in 1810, after the master spinners of Stockport and Stalybridge had secured several convictions under the Act (J. L. and B. Hammond, *Skilled Labourer*, p. 93). Again, in 1818, during a spinners' strike in Manchester, two spinners were convicted for obstructing and ill-treating others at a certain mill. Notice of appeal by the offenders evoked remarks by magistrates in the district which exhibit their distrust of appeals. In a report to the Home Office, one of them asserted that notice of appeal had rendered " all that has been done a perfect nullity, and it does appear from this case that the Combination Act is of very little, if of any, use. . . . The power of appeal should, in my humble opinion, be taken away " (Hammond, *ibid.*, p. 102, n. ; H. O. 42, 179).

Section 9 provided that :

> any person offending against the Act should and might, equally with all other persons, be called upon and compelled to give his testimony and evidence as a witness on behalf of His Majesty, or of the prosecutor or informer, upon any information to be made or exhibited under the Act against any other person or persons, *not being such witnesses*, and that in all such cases, every person having given his testimony as aforesaid, should be and was indemnified against any information to be laid, or prosecution to be commenced against him for having offended in the matter wherein or relative to which he had given testimony or evidence.

The deficiencies of the police system of this period must be taken into account. The ancient institution of the *posse comitatus* and the system of " watch and ward " were still theoretically available, but in practice were generally useless : indeed, until 1818 the great populous centres relied on a small number of magistrates acting through a few constables. The Combination Act itself tended to drive combinations underground, and in consequence proof of their existence was especially difficult.

The devices adopted to facilitate the procurement of evidence and proof may be criticised on two grounds. First, the offences which the Act created were such as might encourage perjury in witnesses because of the difficulty of detection. Petitioners might be exposed to numerous false accusations, especially in view of the fact that prosecutors were generally allowed their expenses, and under the Act they might even derive financial benefit from convictions.[1] Until 1818, the term " forty-pound crime " had a substantial meaning, in that a person credited with its detection received a reward of forty pounds as " blood-money." The office of constable had fallen into disrepute, for undesirable persons had been carelessly promoted to that rank.[2] In the administration of the Combination Act, magistrates and constables had excellent opportunities of engaging in illicit practices. Centrally or locally, informers and spies were employed for the purpose of securing proof of illegal combinations. Until 1820, under the supervision of Lord Sidmouth, this system was encouraged by the central authorities, but after that year Peel adopted the policy of endeavouring to remove the causes of unrest rather than to penalise it.[3] Secondly, Section 9 made the unusual requirement that accused persons should be compellable to give

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[1] This was a strong argument in a petition from certain journeymen of London and Westminster, June 13, 1800, *H. C. Journal ;* H. Martineau, *History of Thirty Years' Peace*, 1849, Vol. 1, p. 67.

[2] P. Colquhoun, *Police of the Metropolis*, 1800, p. 385.

[3] H. Martineau, *op. cit.*, Vol. 1, p. 279.

evidence, which might be used in the conviction of others, while Section 7 even refused to give indemnity against any liability for any offence which the defendants' evidence may have shown him to have committed.[1]

(*d*) *Penalties.*—The penalties prescribed for offences created by the Act were not unduly severe. Those imposed on combinations of masters for breach of Section 17, however, were much less severe than those to which workmen were liable.[2]

The Operation of the Act

1. *Combinations of Workmen.*—The wording of the penal clauses is remarkably vague and conducive to a wide interpretation.[3] Unlike the later trade union legislation, the Act drew no distinction between terms like "persuasion" and "intimidation," and between attempts by workmen to further their own interests by lawful means, and attempts to injure some third persons, whether masters or workmen, by the use of violent or coercive measures. With regard to the enforcement of these clauses by the magistrates, the recorded cases between 1800 and 1824 are not so numerous as might be anticipated. It seems that the summary process of the Act was only directly employed when the offence was not particularly important or dangerous, because the penalties imposed were comparatively light, or when the circumstances were such as to demand a speedy suppression, as a deterrent to others rather than as a punishment of the offenders.

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[1] Unless, of course, he made full discovery under s. 8. The injustice of this is emphasised in a petition from Liverpool and Manchester, June 13, *H. C. Journal.*

[2] For the offences named in ss. 1, 3 and 4, a person convicted might be committed to the common gaol for a term not exceeding three months, or to a House of Correction for a maximum term of two months. The penalty under s. 5, for paying a contribution to meet the offences of any person acting contrary to the Act, was a maximum fine of £10, and for collecting or receiving such money, a maximum fine of £5. Payment was to be enforced, if necessary, by distress and sale; and if there were insufficient distress, the defendant could be committed to the common gaol for a maximum term of three months, without bail or mainprize, or to a House of Correction for not less than two or more than three months. Masters who committed an offence under s. 17 incurred a forfeiture of £20, one half of which went to the Crown, and one half in equal shares to the informer and to the poor of the parish. In default of payment, the forfeiture was to be raised by distress and sale; if distress did not suffice, the convicted persons were liable to imprisonment in the common gaol for a maximum term of three months, or in a House of Correction for a maximum term of two months. With a view to accelerating the administration of justice, it was provided by s. 25 that actions must be commenced within three calendar months, or not at all, and that if the verdict should be in favour of the defendant, or if the plaintiff should be non-suited, the defendant should have full costs. (The 1799 Act, s. 17, provided for treble costs.)

[3] *H. C. Journal*, June 13, 1800, petition of Liverpool labourers.

In cases of greater gravity, the procedure of trial for conspiracy or for some political offence was more frequently resorted to. The penal provisions were so comprehensive that almost any co-operative action by workmen might be construed as a violation of the Act.[1] The right of strikers to picket works where men were still at work was not, as might be thought from Sections 3 and 4, arbitrarily repudiated by the Courts. In fact, the law as to picketing had not yet been clearly defined and distinguished from the law of riot or unlawful assembly or the ordinary law as to assault.[2] There were many convictions for the acts of contributing to trade union funds or towards the expenses of offenders against the Act.[3] It must be noticed, however, that the magistrates were frequently not impartial in applying the statute, and several instances of doubtful convictions have been brought to light.[4]

Further evidence as to the operation of the Act is provided by various reports of trials for conspiracy to violate the Act, which was a common law offence punishable on indictment, and by the reports of decisions by the King's Bench. There are many cases of trials for conspiracy.[5] In 1801, the case of *R.* v.

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[1] In 1823, when the woollen weavers of Frome left their work to enforce their demand for the payment of wages at rates which had obtained before the introduction of Kay's flying-shuttle, eighteen of them were sentenced to imprisonment with hard labour (*Skilled Labourer*, p. 161; H. O. 40, 18). The mere circumstance of being a member of a trade union was criminal. In 1816, seven scissor-grinders were sentenced to three months' imprisonment for belonging to their "Misfortune Club," which paid unemployment benefit and sought to maintain the usual rates of pay (Webb, *Trade Unionism*, p. 80).

[2] *Skilled Labourer*, p. 102; H. O. 42, 178, July 30; H. O. 42, 179, Aug. 19.

[3] For instances, see *Skilled Labourer*, pp. 96, 215–16, 234.

[4] *E.g. Skilled Labourer*, p. 73; Webb, *Trade Unionism*, pp. 79–82; *Select Committee on Artisans and Machinery*, 1824, pp. 415–6, evidence of William Salt. In many districts there appears to have been some foundation, at least, for the expressions used by a workman named Ryding, at the Lancaster Assizes in 1823. Speaking of the justice dispensed by the magistracy and sessions, he said, "There was no justice I saw for the poor man, though it had been often told us that the law of this country was equal to the poor and to the rich." Ryding was on trial for attacking Mr. Horrocks, a master. His offence had been premeditated after a long contemplation of the inequalities between the position of the masters and that of the men, and he acted in order to bring the facts to public notice. "At first," he said, "I was inclined to strike him with a stick, then I was disposed to slap him with my fist, but then, thought I, I shall only be brought before the Sessions at Preston, where of justice I shall get no part, because he is a rich master and I am a poor workman." So he resolved to use a weapon so that he should be tried at the Assizes (Cobbett's *Works*, Vol. 6, pp. 355–8).

[5] In 1812, after the failure of the Glasgow weavers to compel employers to observe the assessment of wages which they had secured from the justices, they declared a great strike. The Strike Committee were tried for conspiracy, and

Salter[1] was decided, apparently on the basis of a conspiracy by certain journeymen hatters to violate a provision of the Statute. The indictment alleged that the defendants had endeavoured to extort from another workman one guinea as a fine for having broken a rule made for the regulation of journeymen hatters, and on his refusal to pay, had endeavoured to cause his discharge, and that the defendants had conspired to prevent his being employed and to compel his master to discharge him by unlawfully absenting themselves and refusing to work for the master. The report informs us that the defendants were convicted. In *R.* v. *Ridgway*,[2] it was held that where quarter sessions, without hearing the merits of the case, had quashed a conviction under Section 4 of the Act of 1800 for a formal defect, the King's Bench should by *certiorari* quash the order of the sessions, if it decided that there was no formal defect. But so that the defendant should not lose his right of appeal on the merits, it was held that the case should be sent for re-trial on its merits by the sessions. The case of *R.* v. *Nield*,[3] appears to have established a good safeguard against groundless convictions. The King's Bench laid down that in order to sustain a conviction, the magistrates must clearly show on the face of it that the Act had been violated. If workmen could have borne the cost of appeals, it seems probable that many of the dubious convictions might have been quashed in this way.

In 1810, a trial took place of *The Times* printers at the Old Bailey. Nineteen workmen were indicted for combining and conspiring together "maliciously to injure" their employers by quitting their work on account of their demands for higher wages not being conceded. Up to a point, counsel for the prosecution appears to have endeavoured to prove a case within the Act, *viz.* that the men were guilty of a combination for the purpose of obtaining higher wages, and also of preventing others from working at the accustomed prices. But he went on to say that "an incalculable injury might be done to the establishment by the men refusing to work for a single night." The defence replied that the giving of two weeks' notice showed that there was no intention or conspiracy to injure the proprietor. The judge, in summing up, said :

> It has been urged by the counsel for the compositors, also, that the giving of notice regularly showed there was no intention of conspiracy.

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sentences varying from four to eighteen months' imprisonment were imposed (Webb, *Trade Unionism*, pp. 58–9, 82). In 1816, the Coventry silk-weavers' association was suppressed by prosecution and conviction for conspiracy (*Skilled Labourer*, pp. 215–16).

[1] 5 Esp., 125 ; cf. *R.* v. *Connell and Others, Times*, July 10, 1819.

[2] 1822, 5 B. & Ald. 527 ; 1 D. & R. 137. [3] 1805, 6 East, 417.

To what end, however, was that notice given, when it was proved that the whole trade was so combined, that there was no chance whatever of having successors to the situations which were thus vacated? It was true that every man had a right to demand what wages he thought his services deserved; this was the law of the land, and the law of reason; but still the manner of making such demand was everything—it could not legally be thus made in a body.[1]

In this case [2] it would seem that combination to cause impoverishment or injury to the employer, and to trade in general, by impeding the employer in some phase of his management, was part at least of the ground of liability, even though the case might be explained on the ground of a violation of the Act. This case appears to form a connecting link between the decisions in *R.* v. *Eccles* and *R.* v. *Mawbey*,[3] and the doctrine of the criminal liability at common law of combinations in restraint of trade on which Parliament framed the legislation of 1824 and 1825.

2. *Combinations of Masters.*—The legal position of a combination of masters before 1799 was very uncertain. The Statute of Artificers, 1562, and many of the special statutes passed during the eighteenth century, merely fixed or provided for the fixing of a *maximum* wage, and consequently an agreement between employers to pay wages at rates lower than the maximum does not seem to have been liable to be treated as a criminal conspiracy. On the other hand, an Act of 1720 [4] for the tailors of London enacted that all retainers, promises, obligations, or securities for any wage, pay or allowances *contrary to the Act* should be null, void, and illegal. Again, the Act of 1773 for the Spitalfields silk workers [5] prohibited the payment or receipt of wages *more or less* than those fixed under the Act. The illegality of combinations to pay lower wages in these cases is only an inference, for not until 1800 were any employers' combinations expressly declared illegal by Statute.[6] It has already been observed [7] that Section 17 of the Act of 1800 prohibited combinations of masters for the purpose of reducing the wages or altering other conditions of

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[1] *Times*, Nov. 9, 1810.

[2] See also *R.* v. *Ferguson and Edge*, 1819, Lancaster Assizes, 2 Starkie, 489.

[3] *Supra*, p. 16.

[4] 7 Geo. I, c. 13.

[5] 13 Geo. III, c. 68.

[6] The Act of 1548, 2 & 3 Ed. VI, c. 15 (The Bill of Conspiracies of Victuallers and Craftsmen), which, so far as it went, applied to all trades, did not in the least apply to combinations of employers. There is no record of any decision before 1799 in which masters were convicted for combining together. Cf. *R.* v. *Hammond & Webb*, 1799, 2 Esp. 719, *per* Lord Kenyon, C.J. See Adam Smith, *Wealth of Nations* (E. Cannan's Edn.), Book I, ch. 8, p. 68.

[7] *Supra*, p. 23.

employment. In actual fact, however, there were many differences left in the respective positions of combinations of workmen and masters. The wording of the Section was too narrow to cover all concerted action by employers, corresponding to the types of act which were made criminal if done by workmen. It is possible to imagine many sets of facts quite outside the terms of Section 17 (*e.g.* an agreement not to engage trade unionists).[1] Again, fewer restrictions were placed on the conduct of individual masters than were imposed on individual workmen, whilst the penalties imposed on masters were less severe than those imposed on workmen. In no case was a combination of masters successfully prosecuted under Section 17. The Select Committee on Artisans and Machinery, in 1824, reported that :

> Several instances have been stated to the committee of prosecutions against masters for combining to lower wages and regulate the hours of working, but no instance has been adduced of any master having been punished for that offence.[2]

It can reasonably be said that in the larger industries, such as cotton, wool, and framework knitting trades, the Combination Laws achieved their object of crushing trade unions and combinations of workmen. But it is a remarkable fact that many combinations of artisans in several other trades appear to have maintained their existence and influence without serious opposition.[3] Some were so strong that prosecutions could do no more than temporarily cripple finances or restrain individuals. The law proved ineffectual, sometimes, because public opinion in the neighbourhood influenced the attitude of the magistrates or rendered proof of liability difficult ; in other cases, because masters were not hostile to the workmen's combinations. The practice of prosecuting and trying criminals without a Public Prosecutor was a further cause of inefficacy.

The Combination Act of 1800 is usually impugned on the ground that it was grossly severe and inequitable.[4] The truth in this view

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[1] At the same time, s. 4 of the Act seems to apply to masters. S. 5, as to the contribution and collection of money for paying the expenses of persons acting contrary to the Act, probably could have been construed similarly. And ss. 6–8, as to the forfeiture of accumulated funds, and s. 9, as to the compulsion of offenders to give evidence, would appear to apply equally to masters.

[2] *R.* v. *Selsby*, 1847, 5 Cox, 495, n., *per* Rolfe, B. ; Chitty, *Criminal Law*, Vol. 3, p. 1169, citing a precedent for a prosecution of a combination of masters ; *Cobbett's Works*, Vol. 6, p. 355—evidence of Ryding at Lancaster Assizes.

[3] See Webb, *Trade Unionism*, p. 77, citing words written in 1823 by George White (Joseph Hume's Clerk).

[4] *Town Labourer*, pp. 129–30.

should not be exaggerated. The sentences inflicted for offences against the Act must be deemed relatively moderate, in view of the fact that at that time so many felonies were punishable with death or transportation. The evils of the Act and of its administration are to be found rather in the insidious ingenuity with which many judicial and executive officers performed their duties, and the absence of principles controlling the enforcement of the law.

CHAPTER IV

THE COMBINATION ACTS, 1824 *AND* 1825[1]

THAT the Combination Laws were oppressive and liable to grave abuses came to be seen in a clearer light shortly after 1820. A large body of opinion, which was in sympathy with the new economic theory of *laissez-faire*, realised that the right of combination could not be denied to the artisan classes while it was freely afforded in practice to employers, and was convinced, moreover, that some measure of combination should be allowed both to labour and to capital. But apparently no two schools of thought could reach agreement as to the limits beyond which this right became injurious to trade and to the community. Indeed, there appeared to be no definite agreement even in that section of opinion which accepted the tenets of Benthamism in relation to economic problems. Individualists of all types accepted the view that labour and capital should be free to contract the terms on which labour should be sold or purchased. But this statement was consonant with labour's contention that the State should not interfere with that co-operation among workmen which was regarded as the natural expression of the individual workman's liberty, and with the argument of capital that the State should prohibit all combinations which in any way shackled the individual workman in the employment of his labour and skill, or the employer in the management of his trade.

The form which the new legislation would take consequently depended on the nature of the views of the school which was powerful enough to control the Legislature. Political fortunes in 1824 favoured that section of Benthamites of which Hume, Place and McCulloch were the leaders in their respective spheres. It is dangerous to hazard a summary of their position on this subject, for they believed that the concession of a right to combine in any substantial degree would bring an end to strikes and violence and even to militant trade unionism. Broadly, they believed that a man should be free to devote his labour or utilise his capital in any lawful trade according to his own choice, subject to a due regard for the similar freedom

[1] 5 Geo. IV, c. 95; 6 Geo. IV, c. 129.

accorded to other men. It was apparent, however, that the "sacred and inviolable property" which a workman had in his own labour was nullified so long as he was prohibited from concerting with his fellows the terms on which they should sell their labour. Therefore, workmen, no less than employers, should be permitted to combine for the purpose of settling these terms, and no distinction, in their opinion, could reasonably be drawn between the terms as to wages and hours, and other terms. At the same time, each must be at liberty to dissociate himself from such combination if he so desired, and *a fortiori*, the combination must not be allowed to subordinate individual freedom to its corporate will by means other than peaceful argument and persuasion. A strike, unaccompanied by violence or threats or minor forms of annoyance, could not be regarded as anything more than a reasonable exercise by the men of their right to withhold their labour in their own interest.

It is probable that the exponents of this theory did not adequately weigh the consequences likely to flow from it, or investigate very intensively the rights or wrongs of the question. They set to work, however, to secure the repeal of the Combination Act, 1800, and manœuvred a Committee of the House of Commons into issuing a report favourable to their views.[1]

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[1] Report of the Committee on Artisans and Machinery, presented to the House of Commons in 1824. The leading resolutions were as follows:

(*a*) That the existing laws had not been effectual in preventing many combinations attended with strikes or suspension of work over wages and other terms, and that masters had often combined for many purposes, and their combinations had often produced strikes, violence and tumult.

(*b*) That prosecutions had frequently been carried on under the Statute and Common Law against the workmen.

(*c*) That the masters had often united to lower the rates of wages as well as to resist a demand for an increase, and to regulate the hours of working; and sometimes to discharge their workmen who would not consent to the conditions offered to them.

(*d*) That several instances had been stated to the Committee of prosecutions against masters for combining to lower wages and to regulate the hours of working but no instance had been adduced of any master having been punished for that offence.

(*e*) That, in the opinion of the Committee, masters and workmen should be freed from such restrictions, as regards the rates of wages and the hours of working, and be left at perfect liberty to make such agreements as they might mutually think proper.

(*f*) That the statutes which interfered in these particulars between masters and workmen should be repealed, and that also the Common Law under which a peaceable meeting of masters or workmen might be prosecuted as a conspiracy should be altered.

(*g*) That serious breaches of the peace and acts of violence had arisen out of combinations, causing loss and injury to employers, workmen and society, and that it was absolutely necessary that any new law should efficiently and by summary

The Act of 1824

In the Preamble of the Act of 1824, it was declared to be expedient "that the laws relative to combinations of workmen and to the fixing of the wages of labour, should be repealed, and that certain combinations should be exempted from punishment, and that the attempt to deter workmen from work should be punished in a summary fashion. . . ."

By Section 1, the previous statutes relative to combinations, including the Act of 1800, were repealed practically *in toto*. The Legislature assumed that the Common Law, which was considered to have been in abeyance since 1800, would now come into operation again, and hence, since it was intended that certain combinations should be legal, it was necessary to rule out their criminal liability at common law. Certain combinations were declared to be no longer criminal by Sections 2 and 3. Section 2 provided that :

> journeymen, workmen, or other persons, who should enter into any combination to obtain an advance or to fix the rate of wages, or to lessen or alter the hours or duration of the time of working, or to decrease the quantity of work, or to induce another to depart from his service before the end of the time or term for which he was hired, or to quit or return his work before the same should be finished, or not being hired, to refuse to enter into work or employment, or to regulate the mode of carrying on any manufacture, trade, or business, or the management thereof, should not therefor be subject or liable to any indictment, or prosecution, for conspiracy, or to any other criminal information or punishment whatever, under the common or the statute law.

Combinations of masters were dealt with by Section 3, which provided that :

> masters, employers, or other persons, who should enter into any combination to lower or to fix the rate of wages, or to increase or alter the hours or duration of the time of working, or to increase the quantity of work, or to regulate the mode of carrying on any manufacture, trade or business, or the management thereof, should not therefor be subject or liable to any indictment, or prosecution, for conspiracy, or to any other criminal information or punishment whatever, under the common or the statute law.

The penal provisions were contained in Sections 5 or 6. Section 5 related to offences by individuals, and enacted that :

> If any person by violence to the person or property, by threats or intimidation,

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process punish either workmen or masters who, by threats, intimidation, or acts of violence, should interfere with that perfect freedom which ought to be allowed to each party of employing his labour or capital in the manner he thought best.

should wilfully or maliciously force another to depart from his hiring or work before the end of the time or term for which he was hired, or return his work before the same should be finished, or damnify, spoil or destroy any machinery, tools, goods, wares, or work or prevent any person not being hired from accepting work or employment; or

if any person should wilfully or maliciously use or employ violence to the person or property, threats or intimidation towards another, on account of his not complying with or conforming to any rules, orders, resolutions, or regulations made to obtain an advance of wages, or to lessen or alter the hours of working, or to decrease the quantity of work, or to regulate the mode of carrying on any manufacture, trade or business, or the management thereof; or

if any person by violence to the person or property, or by threats or intimidation, should wilfully or maliciously force any master or mistress manufacturer, his or her foreman or agent, to make any alteration in their mode of regulating, managing, conducting, or carrying on their manufacture, trade or business;

every person so offending, or causing, procuring, aiding, abetting, or assisting in such offence, being convicted thereof in manner thereafter mentioned, should be imprisoned only and kept to hard labour, for any term not exceeding two calendar months.[1]

Section 6 dealt with the acts named in the previous section, if done by a combination of workmen, and the same penalty was imposed. Section 7 provided for summary trial before two justices of the peace, and by Section 8, such justice must not be a master, or the father or son of any master, engaged in any trade or manufacture.

By virtue of Section 2, workmen might strike for any reason, and peaceably attempt to persuade any workman to leave his work or refuse work.[2] It seems that without criminal consequences they might induce the workmen to break their contracts, but it is by no means certain that the section would be construed to override the existing statute-law rendering criminal combinations to induce a breach of contract.[3] Similarly, Section 3 would permit masters to combine to alter any of the terms of employment of workmen or the mode of regulating their business, and this would comprise the right to lock-out workmen or refuse them work. It is in Sections 5 and 6 that the defects of the Act principally reveal themselves. These sections failed to deal with coercive measures taken by masters, and

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[1] Many of the acts constituting the offences created by s. 5 were, of course, criminal by the ordinary law—*e.g.* violence to person or property, damage to machinery.

[2] Ss. 2 and 3 avoid the defect of treating combinations to raise or lower wages or alter hours of labour differently from combinations to alter other conditions of employment.

[3] See *R.* v. *Bunn*, 1872, 12 Cox, 316.

their terms did not cover the whole ground in enumerating the instances in which threats, violence, or other coercive measures might be used by workmen. Moreover, Section 5 did not cover attempts at intimidation or violence, nor did it cover actual violence, and the like, which failed to effect the required object. Although Section 6 did not provide for combinations to do the acts mentioned, but only for the doing of those acts by more than one person in concert, yet such combinations could have been punished at common law for conspiracy to infringe Section 5.

The framers of this legislation firmly believed that it would have the effect of reducing the number of strikes and exhibitions of violence, but their expectations were soon to receive a rude blow. The outbreaks of rioting and violence, going even to the extremity of homicide, which accompanied the great industrial stoppages of 1825, convinced Parliament that more stringent measures were necessary. It was realised, above all, that the objects which a combination of workmen might lawfully pursue must be more severely restricted, and the inadequacy of the penal clauses of the Act of 1824 must be remedied.[1]

The Act of 1825

The Combination Act, 1824, was repealed.[2] In the main, the new Act followed the arrangement of the earlier one. No reference was made to illegal combinations, but those combinations which were not to be criminal were defined in the careful phraseology of Sections 4 and 5. Section 4 provided that the Act should not :

> extend to subject any persons to punishment who shall meet together for the sole purpose of consulting upon and determining the rate of wages or prices which the persons present at such meeting or any of them shall require or demand for his or their work, or the hours or time for which he or they shall work in any manufacture, trade or business, or who shall enter into any agreement, verbal or written, among themselves, for the purpose of fixing the rate of wages or prices which the parties entering into such agreement, or any of them, shall require or demand for his or their work, or the hours or time for which he or they will work, in any manufacture, trade or business ; and that persons so meeting for the purposes aforesaid, or entering into any such agreement as aforesaid, shall not be liable to any prosecution or penalty for so doing ; any law or statute to the contrary notwithstanding.

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[1] See Sir Robert Peel's *Private Correspondence*, p. 379, quoted in Dicey, *Law and Opinion* (1914 Edn.), p. 197.

[2] S. 1. The Combination Laws repealed by the Act of 1824 were again repealed in almost identical terms (s. 2).

Section 5, which applied to masters, provided that the Act should not extend :

> to subject any persons to punishment who shall meet together for the sole purpose of consulting upon and determining the rate of wages or prices which the persons present at such meeting, or any of them, shall pay to his or their journeymen, workmen or servants, for their work, or the hours or time of working in any manufacture, trade or business, or who shall enter into any agreement, verbal or written, among themselves, for the purpose of fixing the rate of wages or prices, which the parties entering into such agreement, or any of them, shall pay to his or their journeymen, workmen or servants, for their work, or the hours or time of working in any manufacture, trade or business ; and that persons so meeting for the purposes aforesaid, or entering into any such agreement as aforesaid, shall not be liable to any prosecution or penalty for so doing ; any law or statute to the contrary notwithstanding.

The Legislature in 1825 firmly believed that a combination or agreement to alter the conditions of labour was a common law conspiracy, because it was a combination in restraint of trade. Its intention was that the common law should operate to render criminal such of these combinations or agreements as did not come within the terms of Sections 4 and 5.[1]

Section 3 was intended ostensibly to prohibit and penalise certain offences by individuals, no provision being made (as in the Act of 1824 [2]) to meet cases where individuals combined to do those offences, though obviously the existence of combination increased the danger of injury. The most tenable explanation of this is that the Legislature intended to leave the prohibition of such combinations to the operation of the "seventeenth century rule" as to conspiracy, according to which a conspiracy to commit a crime (*e.g.* infringing a penal statute) was a misdemeanor at common law triable on indictment.[3] Section 3 provided, that after the passing of the Act :

> If any person should
> (*a*) by violence to the person or property, or by threats or intimidation, or by molesting or in any way obstructing another, (i) force, or endeavour to force, any journeyman, manufacturer, workman or other person hired or employed in any manufacture, trade or business, to depart from his hiring, employment or work, or to return his work before the same should be finished ; or (ii) prevent, or endeavour to prevent, any journeyman,

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[1] See *supra*, p. 15, and *infra*, p. 42. See *Hansard*, 1825, June 27, Vol. 13, col. 1403, speech of Mr. Wallace.

[2] S. 6.

[3] See *ante*, p. 14. In such a case, the Courts would not be restricted to the comparatively light penalty provided by s. 3.

manufacturer, workman or other person, not being hired or employed, from hiring himself to, or from accepting work or employment from, any person or persons; or

(*b*) use or employ any violence to the person or property of another, or threats or intimidation, or molest or in any way obstruct another, for the purpose of forcing or inducing such person to belong to any club or association, or to contribute to any common fund, or to pay any fine or penalty, or on account of his not belonging to any particular club or association, or not having contributed, or having refused to contribute, to any common fund, or to pay any fine or penalty, or on account of his not having complied or of his refusing to comply with any rules, orders, resolutions, or regulations, made to obtain an advance or to reduce the rate of wages, or to lessen or alter the hours of working, or to decrease or alter the quality of work, or to regulate the mode of carrying on any manufacture, trade or business, or the management thereof; or

(*c*) by violence to the person or property of another, or by threats or intimidation, or by molesting or in any way obstructing another, force or endeavour to force any manufacturer or person carrying on any trade or business (i) to make any alteration in his mode of regulating, managing, conducting, or carrying on such manufacture, trade or business, or (ii) to limit the number of his apprentices, or the number or description of his journeymen, workmen, or servants;

every person so offending, aiding, abetting, or assisting therein, being convicted thereof in the manner provided by the Act, should be imprisoned only, or imprisoned and kept to hard labour, for any time not exceeding three months.

Judicial Interpretation

I. *Combinations exempted from Criminal Liability by the Act of* 1825.—Sections 4 and 5 of the Act of 1825 were very narrow in their operation, for if strictly construed, they permitted merely collective bargaining over wages and hours, but not over other subjects, and yet, even in the case of differences as to wages and hours, the right to resort to strikes or lock-outs to enforce collective decisions was not conferred. Nevertheless, it seems to have been assumed that a strike for the sole purpose of raising wages or altering hours in pursuance of such an agreement was not criminal. This was recognised in Sir William Erle's Memorandum on Trade Union Law, 1868,[1] and in several cases the right to strike in such circumstances was recognised, expressly or impliedly.[2]

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[1] *Infra*, p. 43.

[2] *E.g.* by Erle, J., in *R.* v. *Duffield*, 5 Cox, 404, and *R.* v. *Rowlands*, 5 Cox, 404; and by Bramwell, B., in *R.* v. *Druitt*, 10 Cox, 592.

In 1851, Erle, J., decided in *R.* v. *Duffield*,[1] and in *R.* v. *Rowlands*,[2] that while workmen could freely combine to say that they would not work except for certain wages, it was unlawful for them to combine to induce men, even by peaceful persuasion or the payment of money, to leave their work for the purpose of forcing the consent of their employer to better terms, this being an obstruction of the master both at common law and within Section 3. This interpretation was regarded in such an unfavourable light that in 1859 the Molestation of Workmen Act [3] was passed, in order to amend and explain Section 4 of the Combination Act, 1825. Further, the enactment impliedly recognised the right to strike in furtherance of an agreement or meeting within the terms of Section 4. It provided that :

> no workman or other person, whether actually in employment or not, should, by reason merely of his entering into an agreement with any workman or workmen, or other person or persons, for the purpose of fixing or endeavouring to fix the rate of wages or remuneration at which they or any of them should work, or by reason merely of his endeavouring peaceably, and in a reasonable manner, and without threat or intimidation, direct or indirect, to persuade others to cease or abstain from work, in order to obtain the rate of wages or the altered hours of labour so fixed or agreed upon or to be agreed upon, be deemed or taken to be guilty of " molestation " or " obstruction " within the meaning of the Act of 1825, and should not therefor be subject or liable to any prosecution or indictment for conspiracy : provided always, that nothing in this statute contained should authorise any workman to break or depart from any contract or authorise any attempt to induce any workman to leave or depart from any contract.

The enabling words only applied to combinations or strikes which came within the terms of Section 4 of the Act of 1825, *i.e.*, those relating solely to wages and hours. The Act removed the doubt as to whether persons other than the workmen concerned in the particular trade could take part in meetings, or enter into agreements permitted by Section 4, or actively engage in conducting a strike arising therefrom.[4] Workmen were only considered to be immune from liability for persuading others to cease from work, if there was an agreement and an unsettled claim in respect of wages or hours, of the kind specified by Section 4.[5] Even with this extension, Section 4

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[1] *Loc. cit.*, at p. 431.

[2] At p. 462.

[3] 22 Vict. c. 34.

[4] This question was left undecided in *R.* v. *Rowlands* (5 Cox, at p. 460).

[5] See Sir W. Erle's Memorandum, in 11th and Final Report of the Trades Unions Commission, 1869, pp. 84–5.

of the Act of 1825 does not seem to have granted immunity to any substantial degree to combinations and strikes. It only permitted agreements and meetings if their *sole* purpose was to determine wages or hours of working. The Section did not render immune combinations which only had that as their indirect object (*e.g.* combinations to exclude non-unionists, to restrict apprentices or eliminate overtime or piecework). The Act affects only combinations of workmen, and it is noticeable that no corresponding statute was passed making provision for combinations of masters.

II. Criminal Liability at Common Law, as modified by Sections 4 and 5 of the Act of 1825

(*a*) *Combinations in Restraint of Trade, as Criminal Conspiracies at Common Law.*—At the time of the passing of the Combination Acts, 1824 and 1825, the theory was fairly well accepted that all combinations to alter the conditions of labour were criminal, as being conspiracies at common law. It was said that a conspiracy to injure another was criminal, and it was also claimed that the common law regarded a combination in restraint of trade as a criminal conspiracy. The weakness of the first argument, considered in the light of decided cases, was discussed in Chapter II.[1] With reference to the second contention, the case of *R.* v. *Eccles*,[2] as interpreted by Lord Ellenborough in *R.* v. *Turner*,[3] might be considered an authority for this view, but the vagueness of the report makes it insufficient to ground a principle of common law liability. Nevertheless, in spite of the inadequacy of the authorities, the doctrine seems to have lingered on.

After the Act of 1825, Crompton, J., was the only Judge who unequivocally accepted and sought to apply this doctrine.[4] He first expressed his opinion in *Hilton* v. *Eckersley*.[5] In *Walsby* v. *Anley*,[6] he said :

> It is matter of common learning, that what a man may do singly he may not combine with others to do to the prejudice of another. The Statute 6 Geo. IV, c. 129, by repealing all the previous statutes on the

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[1] See *ante*, p. 15.

[2] 1783, 1 Leach, 274.

[3] 1811, 13 East, 228.

[4] Its influence can be seen in the interpretation of s. 3 by Hill, J., and Blackburn, J., in the Report of the Trades Unions Commission, 1869, and in the terms of the Trade Union Act, 1871. Sir W. Erle (in his Memorandum of 1868) said : "I believe that he (Crompton, J.) never recognised the notion that the Common Law adapts itself by a perpetual process of growth to the perpetual roll of the tide of circumstances as society advances."

[5] 1856, 106 R. R. 507, at p. 511, But cf. *per* Campbell, C.J., at p. 516.

[6] 122 R. R. 823, at p. 827.

> subject, appears to me to have re-established the Common Law as affecting combinations. . . . That being so, it was necessary, by Sections 4 and 5 of the statute, to render legal the combinations of workmen and masters therein referred to respectively, and which would at Common Law have been illegal.

Hill, J., expressed a similar view.[1] The question of the criminality of combinations of workmen at common law was avoided in *Hornby* v. *Close*,[2] and *Wood* v. *Bowron*,[3] but in *R.* v. *Stainer*,[4] where the dicta of Crompton, J., in *Hilton* v. *Eckersley* were cited by counsel with a view to reviving the doctrine, the Court unanimously condemned the doctrine. Cockburn, C.J., said : " It does not follow that because rules may be against public policy, they are therefore criminal." [5]

(*b*) *Sir William Erle's view of the Common Law.*—Another view of the common law was propounded by Sir William Erle [6] in his Memorandum on Trade Union Law to the Report of the Trades Unions Commission, 1869.[7] He pointed out that the common law recognises the general principle that " every person has individually and the public has collectively, a right to require that the course of trade should be kept free from unreasonable obstruction." This is substantially the proposition underlying *Mitchel* v. *Reynolds*,[8] which in its application resulted in the doctrine that contracts in restraint of trade, which failed to satisfy certain tests, were void as against public policy. Every person, he said, had a right to full freedom in disposing of his own labour or capital as he chose, and this right the law would

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[1] At p. 825 ; cf. the judgments of Blackburn, J., in *Skinner* v. *Kitch*, 1867, 10 Cox, 493 ; *O'Neill* v. *Longman*, 1863, 9 Cox, 360 ; *Shelbourne* v. *Oliver*, 1866, 13 L. T. (N.S.) 630.

[2] 1867, 2 Q. B. 153.

[3] 1867, 2 Q. B. 21.

[4] 11 Cox, 483.

[5] See also *per* Keating, J., at p. 489.

The question was finally disposed of in the *Mogul* case, 1892, A. C., 25, in which both the Court of Appeal and the House of Lords agreed that the dicta of Crompton, J., lacked authority and were based on a misconception of the doctrine of restraint of trade.

It must be borne in mind that although the majority of the judges did not corroborate the view of Crompton, J., trade unionists naturally regarded it as a possible weapon against them. In fact, the Majority Report of the Trades Unions Commission, 1869, summarised the Common Law as follows : " With regard to the legality of Trade Unions as at present constituted, we are advised and believe that prior to the Act (5 Geo. IV, c. 95) any such concerted proceeding on the part of the workmen as a strike, would have been an unlawful combination punishable at common law by fine and imprisonment ; and that a union or association of workmen for raising funds to support the men engaged in such a strike, would have been an unlawful association."

[6] Previously Erle, J.

[7] Report, pp. 65–89.

[8] 1711, 1 Sm. L. C. 62.

protect. It followed that "every other person . . . is prohibited from any obstruction to the fullest exercise of this right which can be made compatible with the exercise of similar rights by others." The main requirement, then, was that there must be a violation of a legal right, which might be either a tort or a crime according to circumstances. It is here that the doctrine diverges from that of Crompton, J., for, according to Sir W. Erle, agreements in restraint of trade were not in themselves legal wrongs, public or private, because there was no violation of a public right, or of a private right causing damage.[1]

Sir W. Erle contended that at common law a combination of many to do a wrong, in a matter where the public had an interest, would amount to a substantive offence of conspiracy. The private right to a free course of trade was a right in which the public had an interest. The objects of a combination would be criminal if they were pursued for the purpose of obstructing another in the conduct of his trade or in the disposal of his labour. He gave examples of means by which unlawful obstruction of this legal right might be effected—*e.g.* coercion, molestation. He believed that the act of inducing workmen to leave work either by giving money to them, or by persuasion, even though only peaceful persuasion, if in either case the motive behind the payment or persuasion were malice towards the employer, would be means sufficient to render criminal a combination with the purpose of obstructing the master in his legal right. He defined malice as "some corrupt or spiteful motive," which conclusively displayed that the sole intention was to ruin the employer or injure his manufacture, and not solely to promote the interests of those offering the inducements. It may be surmised that Sir W. Erle's views were tending towards a more general theory as to civil and criminal liability which is bound up with the doctrine of "malice" —*viz.* that a combination to do any act which is likely to cause damage to another's trade, done for the purpose of causing injury to that other person, rather than for the purpose of benefiting those combining, would be criminal. He seems to place the onus on the defendant, on the basis that an act causing obstruction is *prima facie* illegal, but may be justified by proof that it was done for the purpose of benefiting the person causing it.[2] The fact of several combining might often in itself, he added, be evidence of an intention to injure, if the object pursued could not reasonably benefit those combining.

So far as these statements involve that a combination to injure the trade of another, by coercing the free will of the trader or of the persons with whom he was entitled to trade without unlawful inter-

[1] See the judgment of the Court of Exchequer Chamber, in *Hilton* v. *Eckersley*, 106 R. R. at p. 522 (*per* Alderson, B.).

[2] Cf. the remarks of Bowen, L.J., in the *Mogul Case*, 23 Q. B. D., at pp. 618–9.

ruption, was criminal at common law, they are supported by some of the judgments as a true expression of the common law, and this principle actually formed the basis of Section 3 of the Act of 1825.[1] The judgments of Erle, J., in *R.* v. *Rowlands* and *R.* v. *Duffield* expressed substantially the same views as he propounded in his Memorandum. But no other judge was prepared to apply the doctrine of "malice" to this branch of the law. Despite this lack of judicial support, however, the question whether malice might be the gist of liability was still an unsettled problem up to 1871.[2]

III. Section 3 of the Act of 1825

The purpose of Section 3 of the Act of 1825 was to prohibit and penalise certain offences by individuals. The terms of the section were set out above.[3] It has been pointed out that no provision was made for the punishment of combinations which infringed the provisions of the section, and it was therefore necessary to resort to the common law, which would regard such combinations as conspiracies to violate a penal statute. Hence, the section required interpretation whether the charge was brought against individuals or against a combination, and both types of cases are to be found. Two factors operated to render a logical interpretation difficult. In the first place, the section was designed primarily to deal with the acts of individuals, and it is natural that in a combination there is much greater likelihood of coercion. Moreover, while the section required proof of acts involving threats or other specified acts done with any of certain named objects, the law of conspiracy did not (except in order to establish the existence of a combination) require proof of acts committed in furtherance of the combination.[4] Secondly, there was a tendency for judges who supported either the opinion of Crompton, J., or that of Sir William Erle, to construe the terms "obstruction" and "molestation" in Section 3, in such a manner as to give some effect to such opinion. Although most of the decisions are clear and reconcilable, these factors led to many inconsistencies.

The terms of Section 3 show that every offence involved two elements—an *act*, and an *object*. The interpretation of the various objects (*e.g.* to compel or endeavour to compel a workman not to

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[1] *R.* v. *Hewitt*, 1851, 5 Cox, 162, *per* Campbell, C.J.; *R.* v. *Druitt*, 10 Cox, 592, *per* Bramwell, B.

[2] Sir W. Erle's view of criminal conspiracy is very like that ultimately adopted by the House of Lords in *Sorrell* v. *Smith* (1925, A. C. 700, *post*, p. 143); but his view of what could be actionable if done by one person without combination cannot now be accepted (*Allen* v. *Flood*, 1898, A. C. 1).

[3] *Ante*, p. 39.

[4] But see *R.* v. *Selsby*, 1847, 5 Cox, *per* Rolfe, B., at p. 497 (n.).

work, to force or endeavour to force someone to join a union or contribute to its funds) gave rise to no appreciable difficulty, for the meaning was plain. But the terms in which the various acts were described produced much difference of opinion. It is natural to attempt to separate and classify the acts, which were held to infringe Section 3, under the five heads of "violence," "threats," "intimidation," "molestation," and "obstruction." In some of the decisions, however, the same acts were held to involve several of these offences. As Sir William Erle pointed out,[1] the acts are described in words of wide generality, in order to comprehend a wide class of actions which from their nature do not admit of precise definition. The essence of the crime, he said, lay in the intention to coerce the will of another, indicated by some act comprised under one or other of the five terms; the act comprised within any of these terms was sufficient to constitute that element of the offence which consisted in action, if it was reasonably believed by the party committing it to be such as might coerce the will of the party to be affected thereby. The Court, therefore, in construing any of these terms, had to inquire whether the acts alleged were intended to coerce, and reasonably capable of coercing, that free will of a man in the disposition of his labour and capital which the statute, and especially Section 3, sought to preserve.

It is true, of course, that the five terms were intended in a vague way to refer to distinct types of acts, but it is not possible to distinguish exactly between these terms or to classify the decisions under these heads.

(*a*) "*Violence*" would comprise the infliction of bodily harm or any act of injury to property. The extent of the injury was immaterial, if the intention to coerce existed.

(*b*) "*Threats*" primarily referred to creating in the mind of another, by the use of words, a fear that some evil would result to him. The evil must be such that the fear of it would coerce the person threatened in the employment of his labour and capital. The decisions are divided as to whether the evil threatened should itself be an unlawful act, *i.e.* criminal.

(*c*) "*Intimidation*" referred more specifically to fear caused by deeds rather than by words. In a few cases, deeds were held to constitute a threat, but more properly deeds seem to have belonged to the head of intimidation.

(*d*) "*Molestation*" was really an expansion of the first heading, introduced by the Act of 1825. Sir W. Erle defined it as "annoyance in a substantial degree" (*i.e.* "the degree commonly referred to in actions for nuisance").[2] The annoyance might operate on the

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[1] *Memorandum*, p. 82. [2] *Ibid.*, p. 83.

mind, reputation, or freedom of movement. This head and the last were intended to relate principally to acts done by pickets, but they were never properly defined.

(*e*) "*Obstruction*" seems to have been meant to cover particularly the acts of pickets which involved, for example, the obstruction of the right of free passage of workmen to or from their workshops or along a highway. "The amount of actual obstruction," said Sir W. Erle, "is no more material in this offence than the extent of actual removal of a chattel is material in larceny." [1]

For some years after the passing of the Act there was a section of legal opinion which regarded Section 3 as referring only to acts of violence, threats of bodily injury or injury to property, and intimidation, obstruction or molestation produced by such acts or threats. This was urged by Rolfe, B., in *R.* v. *Selsby*.[2] Workmen had combined to strike in order to compel their master to employ only apprentices of a certain age and only workmen who were trade unionists. Handbills had been distributed stating that a steady picket had been placed on the prosecutor's shop, and a body of men had, in fact, patrolled up and down the adjoining street, watching and interfering with workmen. The indictment contained counts charging conspiracy against the statute and the common law, and in particular charged a conspiracy to obstruct and prevent the workmen from continuing in the service of their master, and by illegal means to cause them to be removed from their employer's service, and when so removed to prevent them from obtaining work elsewhere. Rolfe, B., chose only to consider whether the system of picketing adopted had infringed Section 3. He said to the jury :

> Expressions had been used—"You had better not go there, for you will not stop long! If you do, you shall be called a knobstick." "If you go to work there, you will repent it before the winter is over." A great deal may be said as to the precise words used; what I think you must consider is, not so much the very words, as whether the fair result of it was *to intimate* to the person to whom it was addressed *that some bodily harm would happen to him* if he persevered in his intention of working at Messrs. Jones & Potts . . .

This view, which is clearly untenable, did not receive any further judicial confirmation.[3] Some of the later decisions expressly repudiated this narrow construction. Thus, Lush, J., in *Wood* v. *Bowron*,[4] said :

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[1] *Ibid.*

[2] 1847, 5 Cox, 495, n., at p. 497, n.

[3] It was supported by F. D. Longe in his pamphlet, *The Law of Strikes*, 1860.

[4] 1867, 2 Q. B. 21, at p. 30.

> It is too late to say that the word " threat " is limited to the declaration of an intention to do those acts with which it stands in intimate connection, viz., acts of violence to the person or property of another. The cases . . . show that the word must have a wider sense; namely, a threat by act or words of doing some injury to another person.

It is to be observed that it was within the province of the jury to decide whether threats had been employed, and in deciding, the jury had to consider all the circumstances to determine whether moral coercion had been produced. The early cases did not attempt to define a threat, though it was emphasised that a threat need not be express, and the distinction between threats and intimidation appears to have been a fine one and generally disregarded. The judgment of Cockburn, C.J., in *Walsby* v. *Anley* [1] showed, in effect (1) that the existence of a combination could convert into a criminal threat what it would be no criminal threat for one person to say, and that a mere active intimation to a master of an intention to strike by a combination of workmen would be regarded as a " threat " ; (2) that conduct was quite as likely substance of a threat as language, and that the distinction between threats, intimidation, molestation, and obstruction was very vague and not of any great importance, the essential point being the degree of coercion exercised.[2] It would seem to have been necessary to the proof of a threat, to establish (*a*) an intimation capable of having a deterring effect on the minds of ordinary persons, or capable of controlling the free agency of another,[3] (*b*) an intention at the time it was made that it should have that effect ; and (*c*) a communication of such intimation so that it might operate on the mind of the other person.[4]

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[1] 122 R. R. 823.

[2] *Re Perham*, 1859, 5 H. & N. 30, affords an instance of a threat within s. 3 (*a*), as does *O'Neill* v. *Longman*, 1866, 9 Cox, 360. The facts of *Skinner* v. *Kitch*, 1867, 10 Cox, 493, in the opinion of Lush, J., exactly fitted the terms of s. 3 (*c*) ; *Shelbourne* v. *Oliver*, 1866, 13 L. T. N. S. 630, came within the same subsection. The interpretation of the terms " threats " and " intimidation " by Bramwell, B., in *R.* v. *Druitt*, 10 Cox, 592, at p. 600, appears most nearly to reflect the prevailing understanding of those terms, though some criticisms have been levelled at the instances he gives of its application. (Cf. *R.* v. *Shepherd*, 1869, 11 Cox, at p. 327, *per* Lush, J.)

[3] See *R.* v. *Shepherd*, 1869, 11 Cox, 325, *per* Lush, J., at p. 327.

[4] For instances where these requirements were not fulfilled, and consequently where there was no proof of threats or intimation, see *Hilton* v. *Eckersley*, 106, R. R. 516 ; *O'Neill* v. *Kruger*, 1863, 4 B & S. 389 ; *Wood* v. *Bowron*, 1867, 2 Q. B. 21.

A difference which arose was whether a " threat " within s. 3 must be a threat to do an unlawful act. Sir W. Erle expressed the view that the opinion of the judges might support an affirmative answer to this query. The main authority was the opinion of the majority of the Court in *Walsby* v. *Anley*, 122 R. R. 823. (See judgments of Crompton and Hill, JJ.) The judgments of Blackburn, J., in

No case ever decided that workmen would be liable under Section 3 by the mere act of agreeing to leave work, or of leaving work in pursuance of such an agreement. Where the agreement related to objects which Section 4 expressly mentioned—the raising of wages or alteration of hours—the position is quite clear. It is true that Section 4 did not explicitly admit that effect might be given to such an agreement by striking, but it was pointed out above [1] that the Courts assumed the existence of the right to strike in pursuance of a meeting over wages or hours. It is less certain what was the position of a mere agreement to strike, or of an actual strike, with the object of achieving some purpose other than the limited purposes defined by Section 4 (*e.g.* a strike against non-unionists or apprentices). Was this capable of construction as a "molestation" or "obstruction" of the master by a combination within Section 3 (*c*)? Some judges considered that this would be criminal at common law, but there is no authority other than that of Sir W. Erle for the view that a conviction could have been secured under Section 3. On the other hand, from several cases it appears that a mere agreement to strike would not be a violation of Section 3.[2] The decisions in *Wood* v. *Bowron*,[3] and *O'Neill* v. *Kruger*,[4] in fact, implied that a mere resolution and a strike in pursuance thereof, though not relating to hours or wages, without further steps would not be a violation of Section 3, although there was a resolution and a strike for purposes outside Section 4 in these cases.[5] The Courts appear to have required, in

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O'Neill v. *Longman* (1866, 9 Cox, 360); *Skinner* v. *Kitch* (1867, 10 Cox, 493); and *Shelbourne* v. *Oliver* (13 L. T. N. S. 630), show clearly that Crompton, J.'s, interpretation was inseparable from his personal view of the common law (see *ante*, p. 42). The Court in *R.* v. *Druitt*, 10 Cox, 592, refused to adjudicate on the merits of the doctrine supported by Crompton, J., and was inclined to adopt the more reasonable view that the Legislature intended that the Courts should not inspect the legality of the acts threatened, but should rather determine the degree of coercion which operated on the mind of the person affected.

In the language of s. 3 there is no suggestion that a threat must be a threat to do an unlawful act, and in several later decisions, where breaches of s. 3 were proved, it is probable that the acts threatened were not in themselves unlawful. The judgment of Lush, J., in *Wood* v. *Bowron*, *loc. cit.*, follows the view adopted in *R.* v. *Druitt*.

[1] *Ante*, p. 40.

[2] Thus, in *R.* v. *Stainer*, 11 Cox, at p. 486, Cockburn, C.J., asked in argument, "What authority is there for saying that where half a dozen men or more agree not to work at a factory where machinery is used, or where more than a certain number of apprentices are taken, that such a combination, although it may be in restraint of trade, is a criminal offence?" See also *Wood* v. *Bowron*, 1867, 2 Q. B. 21, *per* Lush, J., at p. 30.

[3] 1867, 2 Q. B. 21.

[4] 1863, 4 B. & S. 389.

[5] Cf. *R.* v. *Selsby*, 5 Cox, 495, n. (A case of a strike against non-unionists.)

addition, proof of overt acts intended to coerce the will of the employers—generally a communication of the intention to strike. Generally speaking, any intimation of an intention to strike stating the alternatives to such a step, other than an intimation *bona fide* given in answer to a master's request for information, would be regarded as violating Section 3. It must be borne in mind that Section 3 was originally worded to cover threats by individuals, and it was intended that mere agreements or strikes without actual threats or intimidation should be punished at common law. Agreements and strikes for objects in excess of the privileges given by Section 4 escaped criminal liability, not because Section 3 was inequitable, but because very few judges considered them to be criminal at common law.

Picketing

Picketing was defined in the Report of the Commission of 1869 [1] as "posting members of the union at all the approaches to the works struck against, for the purpose of observing and reporting the workmen going to or coming from the works, and of using such influence as may be in their power to prevent the workmen from accepting work there." As a rule, pickets had no authority from their union to do more than represent to the men at work the case of the union and use argument and persuasion.[2] But it was frequently the case that this authority was exceeded, and the question constantly arose between 1825 and 1871 as to the point at which picketing became criminal under Section 3.

The cases relate principally to the distinction between a "threat" and "peaceful persuasion." In 1847, the case of *R.* v. *Selsby* [3] established that picketing was quite lawful, if it was confined to the use of peaceful persuasion and argument. The possession by trade unions of this right was endangered in 1851 by the application by Erle, J., in *R.* v. *Rowlands* [4] and *R.* v. *Duffield*,[5] of the doctrine later expounded by him in his Memorandum. This doctrine would impose criminal liability on a combination of workmen which, with a malicious motive against the master, set out by peaceful persuasion or the payment of money to induce his workmen to leave his service, even though no breach of contract were involved. Erle, J., regarded such persuasion for the purpose of even compelling masters to raise their scale of wages, as criminal at common law, and also as amounting to the offence of "obstruction" or "molestation" within Section 3 (*c*)

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[1] P. 21.

[2] *Procgs. of Commission of* 1869, Evidence, Qns. 6736–6762 (Evidence of Robert Applegarth).

[3] 5 Cox, 495, n. [4] 5 Cox, 436. [5] 5 Cox, 404.

of the Act of 1825. It is apparent that such a construction had never been anticipated or intended by the Legislature, for the Molestation of Workmen Act, 1859,[1] was enacted to declare and to further the intention of the Act of 1825, and to forestall any later ruling such as that of Erle, J. This statute amplified the powers as to picketing, not only of workmen but of other persons who aided their cause, but it gave no immunity to persons who procured the breach of private contracts, or who, being persuaded to leave their work, broke their contracts. The Act afforded no protection to attempts to persuade workmen to cease work in order to secure objects other than those of raising wages or altering hours (*e.g.* to secure the dismissal of non-unionists). It would seem, then, that the Act of 1859 left it open to the courts to hold that even peaceful persuasion exercised in a reasonable manner, to secure such other objects, was an act of molestation or obstruction against the master either at common law or under Section 3 (*c*). *R.* v. *Selsby*[2] is the only case in which the act of peaceably persuading a man to leave work for some purpose beyond Section 4 of the Act of 1825 was held to be permitted by law; in no other case was the Court called upon to express an opinion on such facts. But since *Wood* v. *Bowron*,[3] and *O'Neill* v. *Kruger*[3] impliedly indicated that a strike called with the object of effecting some purpose outside Section 4, no threats or intimidation having been used, was not in itself a breach of Section 3, it seems unlikely that mere peaceful persuasion exercised reasonably in the conduct of such a strike would, if judicially considered, have been differently regarded.

The leading case, where the distinction between peaceful persuasion and illegal intimidation was drawn, is *R.* v. *Druitt*.[4] Bramwell, B., clearly asserted that picketing was not necessarily criminal. He said:

> If picketing could be done in a way which excited no reasonable alarm or did not coerce or annoy those who were the subjects of it, it would be no offence in law. . . . What was the object of this picketing? Was it that the names and addresses of the non-striking workmen should be found out, with the view to their being addressed by reasonable argument and persuasion, or was it for the purpose of coercion and intimidation?[5]

He considered that "abusive language and gestures," acts "calculated to have a deterring effect on the minds of ordinary persons, by exposing them to have their motions watched, and to encounter black looks," would be criminal.

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[1] 22 Vict. c. 34; see *ante*, p. 41. [2] *Loc. cit.* [3] *Loc. cit.*

[4] 10 Cox, 592. Cf. *R.* v. *Shepherd*, 1869, 11 Cox, 325 (*per* Lush, J.), at p. 327. (A case of peaceful persuasion.)

[5] At p. 601.

CHAPTER V

THE LEGAL STATUS OF TRADE UNIONS BEFORE 1871

BETWEEN 1825 and 1871, the courts allowed that trade societies and other combinations of masters or workmen could enter into agreements relating to wages and hours of labour without incurring criminal liability. In some cases the judges went further, and declined to see any criminality in combinations to alter other conditions of employment (*e.g.* the employment of non-unionists). The difficult question therefore arose as to the legal status of such combinations or agreements as were not criminal. The question was important, in the first place, in deciding whether such an agreement between masters or workmen should be enforceable by the courts as a binding contract; and secondly, it was important in deciding whether, and if so, how far, the benefits of the Friendly Societies Act, 1855,[1] were available to societies performing the functions of a trade union.

In the words of Sir William Erle,[2]

> As to combination, each person has a right to choose whether he will labour or not, and also to choose the terms on which he will consent to labour, if labour be his choice. The power of choice in respect of labour and terms, which one person may exercise and declare singly, many after consultation may exercise jointly, and they may make a simultaneous declaration of their choice, and may lawfully act thereon for the purpose of obtaining the required terms. . . . They cannot create any mutual obligation having the legal effect of binding each other not to work or not to employ unless upon terms allowed by the combination. . . . Every party to it who chooses to put an end to it is thenceforward as free to claim his own terms for his labour, as if such arrangement had never been made. . . . A person can neither alienate for a time his freedom to dispose of his own labour or his own capital according to his own will, nor alienate such freedom generally and make himself a slave; it follows that he cannot transfer it to the governing body of a union.

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[1] 18 & 19 Vict. c. 63.

[2] *Memorandum*, p. 72.

Thus, any agreement which, though not criminal, purported to oblige the members adhering to it to subject themselves to the decisions of the majority in the disposal of their capital or labour, would be void and unenforceable, as being in restraint of trade and opposed to public policy. Consequently, although a trade union with purposes in undue restraint of trade could lawfully collect voluntary contributions for purposes which were not criminal, no member was under any perfect obligation in law to contribute to or pay fines imposed by the union, and no action to enforce any agreement or the payment of any penalty incurred would succeed, nor could any member enforce the satisfaction of any benefits or claims to which under the rules or agreements he was entitled. The courts had recognised, from *Mitchel* v. *Reynolds* [1] onwards, that certain agreements in restraint of trade were legally enforceable, and that the tests devised by the case-law on the topic must be applied to each case. In this period the law was still in process of development. It may be said, however, that the instances of workmen's or masters' agreements which came before the courts up to 1871 were regarded with much suspicion, and the courts required very little evidence of restraint on individuals, or possible damage to trade or society, to satisfy them that the agreement should be avoided.

The first and leading case was that of *Hilton* v. *Eckersley*.[2] Certain manufacturers had entered into a bond, under which they covenanted to abide by the decisions of the majority in such matters as wages, hours of work, suspension of work, and general discipline. It was sought to enforce the bond by action against one of them who had declined to obey a certain resolution. It was held by two judges in the Queen's Bench, and by the Court of Exchequer Chamber, that the agreement was in illegal restraint of trade and so unenforceable, and therefore each obligee was at liberty to act according to his own discretion. Several of the judgments expressed dissatisfaction with the doctrine of "public policy." Lord Campbell, C.J., deplored the fact that so much should depend on the presiding judge's opinions on political economy and other non-legal topics. He thought that where there was no illegality in bonds and other instruments at common law, it would have been better if the courts had been required to give effect to them, unless they were avoided by Act of Parliament. He would have been better pleased, he said, if a clear rule had been expressly laid down for his guidance by the Legislature.

In *Hornby* v. *Close*,[3] it was held that a society which performed many of the functions of a friendly society, but some of the principal

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[1] 1711, 1 P. Wms. 181; 1 Sm. L. C. 462.
[2] 106 R. R. 507.
[3] 1867, 2 Q. B. 153.

objects of which were those of a trade union,[1] was a society for an illegal purpose, in the sense of a purpose which a court of law would not enforce or assist because it was in restraint of trade. This ruling was accepted, in effect, by all the judges in the case of *Farrer* v. *Close*,[2] though they were equally divided as to whether the rules in question in the latter case were or were not in restraint of trade. A more difficult question arose as to what evidence should be admissible to prove that a society was in restraint of trade. A union can only act by resolution or agreement. Should its purposes be ascertained from its published rules or bye-laws or resolutions, or from its conduct and practice? If the former, suppose that no rules were framed? Unions would probably refrain from making rules of an illegal nature if the courts decided questions of illegality from the rules alone. If the Court should inspect the conduct of the union and the way in which it applied its rules, what degree of certainty of evidence should be adopted?[3] In *Farrer* v. *Close*, most of the society's rules were the ordinary rules of a friendly society, but there were several which were not customarily adopted by friendly societies, yet which were not on the face of them actually in restraint of trade.[4] Moreover, there was evidence that the society had supported in many ways strikes in other districts. Cockburn, C.J., and Mellor, J., held that the society was acting in restraint of trade and that the case came within the principle of *Hilton* v. *Eckersley*.

> In the present case the rules are ambiguous, but I think we are bound to look not only to the rules themselves, but also to the conduct and operations of the society; and that we must treat the society not according to what it professes to be, but according to what it practically is. . . . Otherwise, a society, by framing its rules ambiguously so as to be capable of being applied to carry out the purposes of a friendly society or those of a trade union, might, while carrying on its operations as a trade union, evade the law, and obtain the advantages secured by statute to a friendly society, and which would be refused to it, if its true character were avowed.[5]

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[1] *E.g.* rules against piece-work, and a rule imposing fines for seeking employment at a shop where there was a strike in progress.

[2] 1869, 4 Q. B. 602.

[3] This difficulty did not arise in *Hornby* v. *Close*, because the union, though it existed mainly for benevolent purposes, had published among its rules some which were definitely those of a trade union, and the Court held that the very purposes of the existence of the society were in illegal restraint of trade, because they were those of a trade union.

[4] *E.g.* a rule that any officer of the society, being discharged from employment for holding office in the society, should be paid at the rate of wages he was receiving when discharged.

[5] At p. 608.

On the other hand, Hannen, J., and Hayes, J., while in agreement with *Hilton* v. *Eckersley* and *Hornby* v. *Close*, believed that much stronger proof of illegality should be required. They considered that the question whether a society had been established for an illegal purpose or not, ought, with rare exceptions, to be decided by the rules themselves, which declare the objects of the society and speak the voice of all its members.[1] The exceptions would arise where the legal rules were a sham to hide illegal purposes. In this case the evidence was inadequate to establish illegality. The Court being equally divided, the decision of the magistrates that the society was acting in illegal restraint of trade was upheld.[2]

The Position of Trade Union Property

A trade union was legal, or illegal as being in restraint of trade, or criminal, according as the objects which it set before itself, and the means by which those objects were sought to be attained, were legal, unenforceable or criminal. In practice, the activities of a union which wished to remain legal were very limited. It had to confine itself to benevolent purposes—the objects of a friendly society—or to the obtaining of information regarding employment. If it went further and sought to achieve objects which trade unions usually pursue, its objects were regarded as illegal, in the sense of legally unenforceable, and by some regarded as criminal, unless they kept strictly to the objects named in Section 4 of the Act of 1825. The legal status of a trade union—*i.e.* whether its purposes were legal, unenforceable or criminal—determined the degree of protection which the law would afford to the property of the union.

Up to 1871, apart from certain privileges conferred by statute, since a trade union did not enjoy a personality recognised by law, it could not prosecute or sue in its own name, but only through all its members for the time being.[3] A trade union, whether illegal or criminal, could, through all its members, prosecute for larceny or sue in trespass for violation of its rights of property by persons other than members.[4] Nevertheless, there was often difficulty in enforcing these rights, because the membership of a trade union was continually changing, and the persons qualified to join in a suit for the enforcement or protection of a right were often difficult to ascertain. On the other hand, the common law gave scarcely any protection at all against

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[1] At p. 618.

[2] No questions of severance of legal from illegal objects arose in trade union litigation prior to 1871 (*infra*, p. 77).

[3] See *R.* v. *Dodd*, 18 L. T. N. S. 89.

[4] See Sir W. Erle's *Memorandum*, p. 86.

violations of the property rights of a trade union by the members themselves, whether officials or not. This position arose from the peculiar nature of the offence of embezzlement or larceny of joint property. Since the property of a union was the joint property of all its members, just as partnership property is the joint property of the partners, the common law considered that the misappropriation of that property by any member amounted merely to stealing that which belonged to him jointly with the other members. As was said in *R.* v. *Blackburn*,[1] "they could not be convicted of embezzlement, they being supposed to have the same share in the funds as the other members," so that a member abstracting property could not be affected by indictment or action. This absence of protection had no connection with the nature of the society's objects, but arose solely from the fact of joint ownership of the property, and was a defect equally felt by partnerships and all similar groups. The consequence was that trade union property was at the mercy of dishonest officers, but although it was generally believed that an officer could with impunity commit any offence against the property of his union, this was not entirely the case. An official was indictable for any offence which was not affected by the curious legal position of joint property.[2]

Trade unions were naturally led to seek some other protection. Their next step was to ask the courts to construe certain provisions of the Friendly Societies Act, 1855,[3] so as to confer on trade unions the protection given by the Act to a friendly society's property against officers who were guilty of fraud or misappropriation. By Section 44, it was provided that :

> in the case of any friendly society established for any of the purposes mentioned in Section 9 of this Act *or* for any purpose which is not illegal, having written or printed rules, whose rules have not been certified by the Registrar, provided a copy of such rules shall have been deposited with the Registrar, . . . the section in this Act [4] which enacts a punishment in case of fraud or imposition by an officer, member, or person, shall be applicable to such uncertified societies.

Could a trade union, by depositing a copy of its rules with the Registrar of Friendly Societies, take advantage of the summary procedure provided by Section 24 of that Act ? This came up for decision in *Hornby* v. *Close* [5] and *Farrer* v. *Close*,[6] in both of which cases it was held

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[1] 11 Cox, 160.

[2] Thus, in *R.* v. *Dodd*, 18 L. T. N. S. 89, Lush, J., held that an officer was liable for forging a banker's pass-book with intent to defraud.

[3] 18 & 19 Vict. c. 63.

[4] S. 24. [5] 1867, 2 Q. B. 153. [6] 1869, 4 Q. B. 602.

that a trade union which was illegal as being in restraint of trade was not a society "for any purpose which is not illegal" under the Act, and so was excluded from the facilities which the Act provided.[1] These decisions revealed how unlikely it was that many trade unions would be regarded as legal societies, so as to be entitled to enjoy the facilities of the Act of 1855. They did nothing to discourage the official dishonesty which it had been sought to prevent. Redress had to come, if at all, from statute law.[2] Sir William Erle suggested [3] that a law providing that a joint owner, under certain circumstances doing that which would be larceny or embezzlement, if such joint ownership did not exist, should be guilty civilly and criminally notwithstanding his joint ownership, and defining the kinds of societies to which this should apply, would be beneficial in giving trade unions the ordinary legal redress for violation of their property rights by their officers. This suggestion was adopted in Russell Gurney's Act—the Larceny and Embezzlement Act, 1868.[4] It provided that :

> if any person being a member of any co-partnership, or being one of two or more beneficial owners of any money, goods or effects, bills, notes, securities, or other property, shall steal or embezzle any such money, goods . . . or other property, of or belonging to any such co-partnership or to such joint beneficial owners, every such person shall be liable to be dealt with, tried, convicted and punished for the same, as if such person had not been or was not a member of such co-partnership, or one of such beneficial owners.

A summary remedy was added by the Trades Unions Funds Protection Act, 1869.[5] Section 1 provided :

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[1] In *Hornby* v. *Close* it was also held that s. 44 was not available for the further reason that a society, in order to come within that section, must be *ejusdem generis* with a friendly society—*i.e.* must exist for purposes analogous to those mentioned in s. 9 of the Act. This construction of s. 44 is of doubtful quality, for the two classes of societies were clearly disjoined by the word "or." The point was not considered in *Farrer* v. *Close*.

[2] Sir W. Erle (*Memorandum*, pp. 67, 86) believed that a remedy lay within the reach of trade unions, for by making all their objects legal, they could (*a*) claim the protection of the Friendly Societies Act, 1855, and (*b*) acquire legal personality by the act of incorporation, so as to be able to prosecute and sue in their own corporate name. The evidence available as to the nature of all the leading trade unions at that time shows the futility of those remedies, and the impossibility of abandoning trade union objects.

[3] *Memorandum*, p. 67.

[4] 31 & 32 Vict. c. 116. See *R.* v. *Blackburn*, 11 Cox, 160.

[5] 32 & 33 Vict. c. 61, "an Act to protect the funds of trades unions from embezzlement and misappropriation." S. 2 enacted that the statute was not to continue in force after August 31, 1870.

> An association of persons having rules, agreements or practices among themselves, as to the terms on which they or any of them will or will not consent to employ or to be employed, shall not, by reason only that any of such rules, agreements or practices may operate in restraint of trade, or that such association is partly for objects other than the objects mentioned in the Friendly Societies Acts, be deemed for the purpose of Section 24 of the Friendly Societies Act, 1855, for the punishment of frauds and impositions, to be a society established for a purpose which is illegal, or not to be a friendly society within the meaning of Section 44 of the said Act.

As a result of these statutes, a trade union, even though illegal by reason that it had objects in restraint of trade, had remedies by indictment and summary process against misappropriation or embezzlement of its funds by its members, the proceedings being instituted in the name of all its members. One doubt, however, still remained. What was the position of a trade union whose objects were deemed to be criminal, not merely illegal? It had been held in 1838, in *R.* v. *Hunt*,[1] that it was no crime to embezzle the moneys of a criminal society, such as a society which administered unlawful oaths. This decision might have been used to question the rights of a criminal trade union to the facilities afforded either by the Act of 1868 or by that of 1869.

On the former statute there were no cases before 1871, but on the latter there was *R.* v. *Stainer*.[2] The society in this case had rules imposing fines upon members for working beyond certain hours or for applying for work at a firm where there was no vacancy. It was urged by the defence that such rules made the union not only illegal, but criminal.[3] Therefore, it was argued, the service of the defendant, who was an official of the union, was an illegal one, the law would not recognise the relation of master and servant between the union and him, and the union could not own property which could be embezzled. The Court, consisting of five judges, were agreed that unions of this kind, having one or two of the objects of a trade union, might be in illegal restraint of trade, but were not of the opinion that they were also criminal so as to affect their title to the property. The Act of 1869 might be taken as an intimation by the Legislature that such societies should not be prevented from having the protection of the law against embezzlement, and that such rules as in this case were not criminal. It was therefore held that the

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[1] 8 C. & P. 642.

[2] 1770, 11 Cox, 483.

[3] The view of Crompton, J., in *Hilton* v. *Eckersley*, 106 R. R. 507, and that of Grose, J., in *R.* v. *Mawbey*, 6 T. R. 636, were cited. *R.* v. *Hunt*, 8 C. & P. 642, was also relied on by the defence.

remedies afforded by the Act of 1869 were available to such trade unions, and also that they might, by virtue of the Act of 1868, prosecute for embezzlement by indictment. In other words, the fact that the trade union was in illegal restraint of trade did not affect its right to the remedies under the two statutes.[1]

Conclusions

Prior to the legislation of 1871, the law relating to trade unions suffered in respect of clarity from its close connection with the common law doctrines of criminal conspiracy and restraint of trade. It was a regrettable blunder on the part of the Legislature in 1825 to have left those combinations which it desired to be criminal to the vagaries of the common law. One might reasonably doubt the wisdom of allowing such extremely small latitude to the lawful interests of combinations as was conceded by Sections 4 and 5 of the Act of 1825, and see some justification for the contemporary query whether in permitting workmen to form associations and frame rules, but at the same time refusing them the privilege of enforcing a single decree, the Legislature was not putting a sword into their hands and interdicting their use of it.[2] Having once resolved on the nature of Sections 4 and 5, the Legislature should have proceeded expressly to make all combinations which exceeded the terms of those sections criminal, and thus ensured that Section 3 would have been available only to punish offences by individuals. Instead of that, the scheme of criminal liability of trade unions was constructed on the unstable foundations of an insufficiently supported theory. In particular, the law of criminal conspiracy had never been so accurately defined as to justify the Legislature in refraining from laying down more precisely the grounds of criminal liability of employers and work-

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[1] *R.* v. *Hall*, 1836, 1 Moo. C. C. R. 474, is a parallel case. Cf. *R.* v. *Jenson*, 1835, 1 Moo. C. C. R. 434. And see the judgment of Coleridge, C.J., in the later case of *R.* v. *Tankard*, 1894, 1 Q. B. 548, where *R.* v. *Stainer* was followed.

The Court in *R.* v. *Stainer* did not need to determine what would have been the rights of the union if the rules had been held criminal as the defence claimed. Probably it would have been held, on the basis of *R.* v. *Hunt* (8 C. & P. 642), that since a criminal society could not make a good title to its property, it could not prosecute either under 31 & 32 Vict. c. 116, or under 32 & 33 Vict. c. 61. One may assume, then, that if a society was held to have objects which were criminal on the ground of restraint of trade, and which were not protected by s. 4 of the Act of 1825, such union would enjoy no legal protection, under the statutes of 1868 and 1869 or otherwise, against larceny or embezzlement by its officers. In this connection, the distinction between unions which confined their objects to those specified in s. 4 of the 1825 Act, and those which did not, would have been important, and would have produced results unfair to the latter.

[2] *Monthly Review*, Jan. 1826, p. 6.

men. The consequences of this neglect were realised in the extreme variety of views on the law of criminal conspiracy and restraint of trade expressed up to 1871.

The clarity of trade union law suffered equally from the gradual change which came over public opinion during this period. With the constant infusion of the prevailing sentiments of the age into the law administered by the courts, this change was clearly reflected in the opinions expressed by the judges. Thus, towards 1871, although the common law doctrines expounded by certain judges had not been finally exploded, and although they were embodied in the Report of the Commission of 1869, yet in practice they did little to restrict the activities of masters and men. It was seen, above all, that the Act of 1825 had been built on an indefensible distinction between combinations and strikes relating to wages and hours of labour, and those relating to other questions, such as the employment of apprentices and non-unionists; the distinction is untenable, because all combinations and strikes are intended, directly or indirectly, to better the conditions of the parties to them, and are alike capable of working harm to the persons against whom they are aimed. In practice, effect was not given to this distinction in anything like the measure which had been intended, for when the courts began to question the authority for the doctrine that a contract in restraint of trade was a criminal conspiracy at common law, Section 3 of the Act of 1825 became the sole penal provision relating to combinations of employers or workmen to which resort was regularly made. For some time prior to 1871, the law, as it stood theoretically, was in practice almost a dead letter in view of the fewness and the nature of the prosecutions actually taken.[1]

The defects of Section 3 of the Act of 1825 have already been analysed.[2] The section erred in the generality of its language. The terms "threats," "intimidation," "molestation," and "obstruction" were thrust upon the courts, and there was little to guide them in interpretation. The last two terms especially were never, up to 1871, judicially defined, and Sir William Erle's attempt to define them is not acceptable. Some distinctions must of necessity be drawn, such as that between intimidation and peaceful persuasion. But even in that case, the intrusion of a supposed common law doctrine in *R.* v.

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[1] As was said in the Minority Report of 1869, "the liberty for workmen to make agreements among themselves as to the terms they shall demand, and by lawful and orderly means to give effect to such agreements, has been long conceded in practice, and seems to us an unquestionable right. The limited and indirect way in which that right is conceded, for certain purposes only, by the combination laws, is far from meeting the justice of the case" (at p. 52).

[2] *Ante*, p. 45.

Rowlands[1] called for legislative interference in 1859, though the Act of that year only partially obliterated the influence of the doctrine. Moreover, Section 3 seems to have given rise to the anomaly that a strike for any purpose was not in itself criminal by the statute, but the threat of a strike (with the possible exception of a strike over wages or hours) was criminal under Section 3 (*c*). This anomaly was partially rectified by the practice of the courts in requiring very little proof of a threat. The distinction between a mere intimation of a strike, made intentionally for the purpose of compelling the master to make some concession, and an intimation of a strike made *bona fide* with no such coercive intention, was never properly worked out, and as it stood was not supportable by reason.

The principles underlying the law as to picketing previous to 1871 appear to have been sound, but the application of them in practice gave too large a freedom to the courts. The problem whether the limits of legal picketing should have been minutely fixed by statute was a nice one.[2] The Act of 1825 stated the law in very indefinite language, while later Acts have gone into greater detail. The history of that Act revealed that to make no attempt at the definition of picketing resulted in many acts and words being held to be criminal when done or said by workmen pickets, which could under no other circumstances have given rise to criminal liability. For it must be remembered that even a threat to maim or murder was not at that time indictable under the ordinary law. On the other hand, it was apparent that if the offence were defined in detail, workmen could devise means of evasion and render the enactment nugatory. Before 1871 it was becoming recognised that of the two methods, that of precise definition was preferable. It was also felt that the criminal liability of trade unions should rest wholly on statute law, and that the doctrine of restraint of trade should be confined in its operation to the law of contracts and torts.

To sum up: it is erroneous to consider that all trade unions prior to 1871 were associations outlawed by the courts and deprived of all rights and powers of protecting their property and enforcing their decisions and agreements, in the same manner as criminal associations. Such a theory was frequently denounced by the courts, and trade unions were considered as legal, or illegal in the sense that the courts would not assist the enforcement of their agreements, according as their rules were not or were in illegal restraint of trade. From *Hilton* v. *Eckersley* till the close of the nineteenth century, there was

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[1] 5 Cox, 436.

[2] See the view expressed in the Dissenting Report of 1869, at p. 58, which has not, however, been adopted in the series of legislative enactments since 1871.

a steady process whereby the application of the doctrine of restraint of trade to trade union agreements was gradually ameliorated. Later, the courts began to look only to the rules and resolutions of the trade union (unless they were on the face of them a mere sham to hide different purposes), rather than to the manner in which the rules had in practice been applied. Further, it was slowly conceded that not all strikes, or all activities in support of strikes, were in restraint of trade, and that some in fact might be legal. But in 1871 this process of amelioration was only just beginning, and in practice any association engaging in the ordinary activities of a trade union was deemed to be acting in illegal restraint of trade, and therefore unable to enforce its rules or decisions by legal process. On the other hand, the insecurity of trade union property against officials could not be attributed to the defects of trade union legislation, but rather to the omissions of the general criminal law relating to the property of partnerships and of persons holding in joint ownership. Again, the illegality of trade unions did not interfere with their right to protection for their property against larceny or trespass by persons other than members, such right being weakened only by their inability to sue or prosecute in their own names. Consequently, it was felt that the sphere in which trade union law was principally at fault concerned the important part played by the doctrine of restraint of trade. It was seen even by judges who were convinced of the desirability of most trade union agreements being unenforceable, that that doctrine was incapable of exact definition, and that it was advisable that Parliament should, in relation to trade unions, define those types of rules and agreements which should be unenforceable and those which should have obligatory force. Moreover, powerful opinion was moving towards the position that by some mode of registration or otherwise, a trade union should be able to acquire a certain measure of juristic personality which would effectively simplify the complexities produced by the remedial legislation of 1868 and 1869, which attempted (with only partial success) to afford legal protection to the property of a trade union.

PART II

CHAPTER I

TRADE UNIONS AND THE LAW OF CONTRACTS

The Trade Union Act, 1871 [1]

Before 1871, the term "trade union" was in general use with a fairly precise significance—viz. an unincorporated voluntary association of individuals, sometimes performing the functions of a friendly society, but primarily constituted to maintain, and if possible improve, the terms and conditions of employment of its members by its aggregate strength in men and money.[2]

The legal position of trade unions before 1871 has already been examined.[3] It was seen that the purposes which trade unions ordinarily pursued were at common law in illegal restraint of trade, so that agreements arising from them were illegal and unenforceable; that the law afforded very inadequate protection to trade union property, a defect which Russell Gurney's Act, 1868, only partially removed; and that until the Trades Unions Funds Protection Act was passed in 1869 a trade union did not possess any summary remedy against officers who were guilty of fraud or misappropriation, such as the Friendly Societies Act, 1855, conferred on a friendly society.[4]

Further, the law of criminal conspiracy was so unsettled that the opinion prevailed in some quarters that a trade union, having purposes in undue restraint of trade, was at common law a combination in illegal restraint of trade, and on that ground a criminal conspiracy.

In 1867 a Royal Commission was appointed to inquire into the whole question of the reform of trade union law. Both the majority and minority reports thereof, published two years later, favoured radical concessions of rights and powers to trade unions, but it was

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[1] 34 & 35 Vict. c. 31.

[2] See *Minority Report* of Trades Unions Commission, 1869, p. 41. Also *Osborne's Case*, 1909, 1 Ch. at p. 174, *per* Cozens-Hardy, M.R.; *ibid.*, at p. 189, *per* Farwell, L.J.; *ibid.*, 1910, A. C., at p. 107, *per* Lord Shaw.

[3] See *ante*, Part I, Ch. V.

[4] This Act was only a temporary measure, pending the passing of the main Act, since the law was still intricate and uncertain.

the minority report (the more liberal of the two) which largely foreshadowed the contents of the Act of 1871. The reports seem to have assumed that the normal purposes of a trade union were, at common law, invariably in illegal restraint of trade, so as to render the union not merely an illegal but a criminal association. The minority report recognised that the two great needs of the time were that the trade union should cease to be an "outlawed" institution, and that so long as it did not pursue criminal objects it should be protected in the possession of such property as it deemed requisite for the fulfilment of its aims.[1] The latter need was easily capable of being met by the establishment of a system of registration, so that a union could, by complying with the provisions of the statute, become a registered trade union, with power to own a certain amount of property and to act by agents. But the former need was hedged about by considerations of public policy, and of the expressed desires of the employing and working classes. It was clear that the application of the common law doctrine of restraint of trade to trade unions wrought great injustice. But a measure which should totally remove the illegality of a trade union arising from the fact that it had purposes in restraint of trade, would produce the undesired result of rendering legal and enforceable every agreement or trust of a trade union which was not illegal or unenforceable on some other ground. It was felt that, for the most part, it was beneficial to the unions and to society as a whole that not all the internal and domestic arrangements of trade unions should be matters for judicial control and enforcement. "They should rest entirely on consent."[2] Lord Robson later expressed the objection as follows:

> Had it (the Legislature) gone further and altogether excluded the application of the common law doctrine in this connection, the courts would have been compelled to give full effect by decree, or injunction, to contracts whereby workmen had bound themselves not to undertake certain legitimate kinds of work, and to refrain, under certain circumstances, from working at their trade at all, except by leave of their union, no matter what their immediate necessities might be.[3]

The minority report also asserted that the time was not yet ripe for enabling trade unions to sue and be sued by their members, *i.e.* to recover contributions or fines from members, and be made liable to members for the benefits assured to them.[4] The remedy of incor-

[1] It recommended that the State should accord "bare legal recognition under the condition of ample publicity." *Report*, p. 60.

[2] *Report*, at p. 59.

[3] *Russell's Case*, 1912, A. C. 421, at p. 441. Cf. *Rigby* v. *Connol*, 14 Ch. D. 482, *per* Jessel, M.R.

[4] *Report*, p. 59.

porating the trade union would have been equally injurious and unpopular on the same grounds. The minority report declared emphatically against any enforced separation and division of the funds of trade unions into those for trade purposes and those for benefit purposes, for to preclude a union from existing for both purposes would be "tantamount to a proposal to suppress unionism by statute," while to require a separation of the funds would be impracticable, because it is often hardly possible to distinguish between a trade purpose and a benefit purpose, and injurious, since it would deprive the unions of every motive they had not to expend their funds in strikes.[1]

The scheme of statutory recognition ultimately brought about in 1871 may have appeared to some as "a remarkable relic of prejudice," or as "the result of great legislative timidity,"[2] but it is probable that, in the circumstances, nothing more than a bare legitimation of trade union purposes was desirable or practicable. The nature of the 1871 Act has greatly affected the development of trade union law in England, and the statute and case law of later years cannot be adequately understood apart from it.[3]

The Trade Union Act, 1871, may be regarded as a measure of partial legalisation of trade unions. Sections 2 and 3 remove certain elements of illegality which previously had existed, or were thought to have existed. The term "trade union" is defined in Section 23[4] so as to ensure that the immunities and privileges accorded by the Act shall extend to a clear-cut class of associations. Section 2 provides that the purposes of any trade union shall not, by reason merely[5] that they are in restraint of trade, be deemed to be unlawful so as to render any member of such trade union liable to criminal prosecution for conspiracy or otherwise. Hence, any suspicion which might have been entertained in 1871 that a trade union with purposes which were in restraint of trade might on that ground alone be regarded as a criminal association was removed. Since, however, in *R.* v. *Stainer*,[6] this suspicion had practically been dispelled, Section 2 was probably in effect declaratory.

Section 3 completes the removal of illegality arising from restraints

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[1] *Ibid.*, p. 60.

[2] *Howden's Case*, 1905, A. C. at p. 275.

[3] See *Manchester Guardian*, 1910, Sept. 17 *et seq.* (articles by Professor Geldart).

[4] See *post*, p. 92.

[5] The effect of "by reason merely" is that s. 2 does not relieve members of trade unions from criminal liability incurred on any other ground, so that *e.g.* any liability incurred by reason of any offence against the Trade Disputes and Trade Unions Act, 1927, is not affected by s. 2 of the 1871 Act.

[6] 1870, 11 Cox, 483.

of trade. It enacts that the purposes of any trade union shall not, by reason merely that they are in restraint of trade, be unlawful so as to render void or voidable any agreement or trust. In other words, all agreements or trusts of a trade union which, if the Act had not been passed, would have been void or voidable by reason that one or more of the purposes of the union are in illegal restraint of trade at common law, are henceforward to be legal and valid.[1] Sections 2 and 3, then, are concerned with the validity of trade union agreements. The position as to remedies remains more complex. If Sections 2 and 3 had stood alone, the agreements and trusts which those sections rendered legal would also have been thereby rendered enforceable by courts of law and equity. But the Legislature in 1871 had no desire to make enforceable all domestic agreements entered into by trade unions. Section 4, therefore, goes on to restrict the remedies available for the enforcement of certain specified types of agreements. It provides that nothing in the Act shall enable any court to entertain any legal proceeding instituted with the object of directly enforcing or recovering damages for the breach of any of such specified agreements.[2] But Section 4 also provides that nothing in that section is to be deemed to constitute any of the specified agreements unlawful. This indicates that Section 4, while interfering with their enforceability, leaves their validity untouched. A union which makes agreements of a type covered by Section 4 is not thereby constituted an unlawful society, and thus preserves its right to be registered under the Act of 1871 as a trade union.

The words "nothing in this Act shall enable" imply that Section 4 places no restrictions on the enforceability of agreements concerning which the courts may entertain proceedings without reference to the Act. It governs only the agreements of such trade unions as at common law would be illegal by reason that they have purposes in illegal restraint of trade, and the legality of whose agreements, after 1871, is due to the operation of Sections 2 and 3. Consequently, if an action be brought on an agreement of a trade union which would be a legal society at common law, Section 4 will have no bearing thereon, and the agreement will be valid and enforceable unless it violates some other principle of law[3]; on the other hand, if the union would be an illegal society at common law because it has purposes in restraint of trade, the enforceability of its agreements and trusts will be governed by Section 4.

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[1] *I.e.* unless those purposes are illegal on some other ground so as to render the agreements or trusts void or voidable. (Note the expression "by reason only" in s. 3, as in s. 2.)

[2] For these agreements, see *post*, p. 79.

[3] See *Gozney's Case*, 1909, 1 K. B. at p. 915, *per* Cozens-Hardy, M.R.

The legality or illegality of trade unions at common law, according to whether their purposes are in restraint of trade, would appear to be the principal issue.[1] It will therefore be necessary to explain the principles of the law relating to restraint of trade.

The Doctrine of Restraint of Trade

The Common Law deems certain contracts which are in restraint of the free course of trade to be contrary to public policy and therefore void.

Two apparently conflicting interests have to be reconciled. The public have an interest in both the freedom of trade and employment and the freedom of contract, and according as the trend of effective opinion is towards the one or the other extreme, the courts tend to view commercial and industrial restrictions with suspicion or approbation. Thus, the former principle was in the ascendancy till far into the last century; the latter gradually supplanted it as *laissez-faire* teachings claimed adherents; but, in recent years, judicial opinion seems to have reverted once more to an attitude of suspicion and precaution.

The *locus classicus* on this subject is the judgment of Lord Macclesfield in *Mitchel* v. *Reynolds*, 1711,[2] in which a body of rational principles was framed, some of which are accepted to-day, after two centuries of economic change.[3]

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[1] See *Osborne's Case*, 1911, 1 Ch. 556–8, *per* Fletcher-Moulton, L.J. Yet in two cases (*Russell's Case*, 1912, A. C. 421; *Thomas's Case*, 1912, 28 T. L. R. 372) the relevance of the distinction between a legal and an illegal society at common law in certain suits founded on ss. 3 and 4 has been questioned, to an extent at present uncertain. In these cases registered trade unions were made defendants in their registered names in suits to enforce certain rules of the unions. In *Russell's Case*, Lord Loreburn, L.C., and Lord Atkinson dismissed the appeal without discussing whether the union was legal or illegal at common law, arguing that a suit of that kind against a registered trade union could not be subjected to the same considerations which in the *Taff Vale Case* (1901, A. C. 427) had led the Court to hold that a union might be sued in its registered name for wrongs done by its agents. The exact consequences of this view cannot easily be estimated. It affects only registered unions; it appears to hold that where an agreement of a registered trade union is covered by s. 4, no proceeding directly to enforce it, or to claim damages for the breach of it, can be entertained if the suit be brought against the union *eo nomine*, whether the union be in illegal restraint of trade at common law or not, but that the proper form of action would be a representative action in a court of equity. If the opinion of Lord Atkinson is good law now, the question whether a union is legal or illegal at common law ceases to be an issue in a suit of the nature described. But it cannot as yet be regarded as certain law, because the majority of the House of Lords in *Russell's Case* did not follow Lord Atkinson, and the dicta in point in *Thomas's Case* were merely *obiter*.

[2] 1711, 1 P. Wms. 181, 1 Sm. L. C., p. 462.

[3] See *Morris* v. *Saxelby*, 1916, 1 A. C. at p. 717, *per* Lord Shaw.

Restraints on trade were divided into general and partial restraints. It was laid down that the Court raised a *prima facie* presumption that a contract or covenant in restraint of trade was bad and unenforceable; that in the case of general restraints, this presumption could not be rebutted, but partial restraints were void if without consideration, valid if with consideration. In the nineteenth century, certain modifications of these rules were introduced, chiefly in the definition of a reasonable restraint,[1] and with regard to consideration.[2] Most of the difficulties outstanding were settled in the famous case of *Maxim-Nordenfelt Guns Co., Ltd.* v. *Nordenfelt*,[3] which established that reasonableness should be the test applicable to all restraints, general or partial. Lord Macnaghten summarised the law in these words:

> "The public have an interest in every person's carrying on his trade freely; so has the individual. All interference with individual liberty of action in trading, and all restraints of trade of themselves, if there is nothing more, are contrary to public policy, and therefore void. That is the general rule. But there are exceptions." Restraints of trade are justifiable "if the restriction is reasonable—reasonable, that is, in reference to the interests of the parties concerned, and reasonable in reference to the interests of the public, so framed and so guarded as to afford adequate protection to the party in whose favour it is imposed, while at the same time it is in no way injurious to the public."[4]

Later cases showed that the *Nordenfelt* case had really left outstanding two points over which there was a conflict of opinion. In the first place, it was not certain on which party should rest the onus of proof.[5] Secondly, a reasonable restraint had not been precisely defined. The threatened divergence from Lord Macnaghten's opinion was towards making the reasonable protection of the covenantee the only or by far the largest consideration.[6]

The present law is to be found mainly in the decisions of the House of Lords in three leading cases.[7] A sharp distinction is drawn between

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[1] See definition by Tindal, C.J., in *Horner* v. *Graves*, 1831, 7 Bing. 735; *Mallan* v. *May*, 1843, 11 M. & W. 653; cf. *Whittaker* v. *Howe*, 1841, 3 Beav. 383; and *Rousillon* v. *Rousillon*, 1880, 14 Ch. D. 351.

[2] *Tallis* v. *Tallis*, 1853, I. E. & B. 391; *Hitchcock* v. *Coker*, 1837, 1 N. & P. 796.

[3] 1893, 1 Ch. 630; and 1894, A. C. 535.

[4] 1894, A. C. at p. 565.

[5] *Mills* v. *Dunham*, 1891, 1 Ch. 576, *per* Lindley, L.J.; *Haynes* v. *Doman*, 1899, 2 Ch. 13, *per* Romer, L.J.; and cf. *Underwood* v. *Barker*, 1899, 1 Ch. 300, *per* V.-Williams, L.J., and *Beetham* v. *Fraser*, 21 T. L. R. 8.

[6] Cf. the judgments of V.-Williams, L.J., and Lindley, L.J., in *Underwood* v. *Barker*, 1899, 1 Ch. 300.

[7] *Mason* v. *Provident Clothing Co.*, 1913, 1 K. B. 65, and 1913, A. C. 724; *Morris* v. *Saxelby*, 1915, 2 Ch. 57, and 1916, 1 A. C. 688; *A.-G. of Australia* v. *Adelaide SS. Co.*, 1913, 29 T. L. R. 743.

restraints which occur in contracts between employers and employees and those relating to the sale of the goodwill of a business. These cases follow Lord Macnaghten's judgment, but add certain explanations. It is emphasised that the public interest and the interest of the covenantor generally overlap if they are not quite co-terminous,[1] and that the covenantor in pleading his own interest will go on the lines that the restraint, if general, would be injurious to society.[2] Subject to this, the test is :

> If the restraint affords to the person in whose favour it is imposed nothing more than a reasonable protection against something which he is entitled to be protected against, then as between the parties concerned the restraint is to be held to be reasonable in reference to their respective interests ; but notwithstanding this, the restraint may still be held to be injurious to the public and therefore void ; the onus of establishing . . . facts and circumstances which show that the restraint is of the reasonable character above mentioned, resting upon the person alleging that it is of that character, and the onus of showing that notwithstanding that it is of that character, it is nevertheless injurious to the public and therefore void, resting in like manner on the party alleging the latter.[3]

It was pointed out in *Morris* v. *Saxelby* that the latest tendency of judicial opinion is to pay regard to the covenantor, the weaker party, as such,[4] and a timely warning has been given against the danger of reviving the old doctrine that the Court may inquire into the adequacy of the consideration given, in deciding whether the covenant is valid.[5]

The fact that an agreement contains some provisions which are in illegal restraint of trade does not necessarily mean that the whole agreement will be unenforceable. The law has attempted to define the circumstances in which valid portions will be severed from the invalid portions and the former alone enforced. In this connection, contracts which contain provisions in illegal restraint of trade are treated on the same footing as contracts with provisions which are illegal on other grounds. The general rule is that where the illegal part of a covenant cannot be separated from the legal part, the covenant is altogether void, but where it can be severed, whether the illegality be at common law or created by statute, the bad part may be rejected and the good part retained.[6]

This general rule, while easy to state, is often extremely difficult

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[1] 1916, 1 A. C. at p. 699, *per* Lord Atkinson.
[2] *Ibid.*, at p. 716, *per* Lord Shaw.
[3] 1916, 1 A. C. at p. 700, *per* Lord Atkinson.
[4] 1915, 2 Ch. at p. 82, *per* Phillimore, L.J.
[5] *McEllistrim's Case*, 1919, A. C. at p. 598, *per* Lord Parmoor ; and *Attwood* v. *Lamont*, 1920, 3 K. B. at p. 589, *per* Younger, L.J.
[6] *Pickering* v. *Ilfracombe Rly. Co.*, 3 C. P. at p. 250.

to apply. The matter was discussed in *Attwood* v. *Lamont*,[1] where Younger, L.J.,[2] expressed the view that "previously accepted rules as to the doctrine of severance require careful application if not entire reconsideration." His judgment contains a thorough analysis of the doctrine, which he expresses in the following terms :

> Severance is permissible in a case where the covenant is not really a single covenant but is in effect a combination of several distinct covenants. In that case, and where the severance can be carried out without the addition or alteration of a word, it is permissible.

More recently, in *Putsman* v. *Taylor*,[3] Salter, J., said :

> If the promise sought to be enforced is invalid, as being in undue restraint of trade, or for any other reason, the Court will not invent a valid promise by the deletion, alteration, or addition of words, and thus enforce a promise which the promisor might well have made, but did not make. The promise, to be enforceable, must be on the face of the document a separate promise, a separate compact, the subject of separate consideration and accord, the performance of which is independent of the performance of any other promise which the promisor may have made. . . . Severance, as it seems to me, is the act of the parties, not of the Court.[4]

Trade Unions and Restraints on Trade

It is well settled that agreements concerning labour and capital are sufficiently contracts for the regulation of trade to be affected by the application of the doctrine of restraint of trade.[5] On the general question of the application of this doctrine to trade unions, there is adequate indication that the courts have generally adopted conceptions similar to those which govern covenants between employers and servants, especially in their scrupulous regard for the interests of the covenantor and the public and of trade in general.

From the cases decided before 1871 relating to the legality of trade union purposes it might reasonably be inferred that trade unions were almost invariably illegal societies at common law on the ground that they had objects or rules in undue restraint of trade.[6] In *Farrer*

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[1] 1920, 3 K. B. 571, at p. 593.

[2] Following Lords Shaw and Moulton in *Morris* v. *Saxelby*, 1916, 1 A. C. 688. Cf. *Mason's Case*, 1913, A. C. at p. 745.

[3] 1927, 1 K. B. 637, at p. 639.

[4] For an admirable brief discussion of this topic, see Batt, *Law of Master and Servant* (1929), pp. 90 *et seq.* And see *Goldsoll* v. *Goldman*, 1915, 1 Ch. 292 ; *Clark, Sharp & Co., Ltd.* v. *Solomon*, 1920, 37 T. L. R. 176, C. A.

[5] See *Allen* v. *Flood*, 1898, A. C. at p. 168.

[6] See *Hornby* v. *Close*, 1867, 2 Q. B. 153 ; *R.* v. *Stainer*, 1870, 11 Cox, 483 ; *Farrer* v. *Close*, 1869, 4 Q. B. 602 ; *Hilton* v. *Eckersley*, 106 R. R. 516 ; *ante*, pp. 52–5. The only dissenting notes struck were by Hannen, J., and Hayes, J., in *Farrer* v. *Close*, and by Erle, J., in *Hilton* v. *Eckersley*.

v. *Close*, moreover, the judgments of Cockburn, C.J., and Blackburn, J., took into consideration the conduct and practices of the union in carrying out the purposes in determining whether or not the union in that case was a legal society. The Trade Union Act, 1871, appears, in its definition of a trade union, to have embodied the view that a trade union was an illegal society at common law.[1] In several instances since the Act, judicial dicta have conveyed the same opinion, though perhaps inadvertently.[2] But the better opinion is that the term "trade union" does not imply illegality at all, but is in itself a neutral term,[3] and at the present time a trade union may be either legal or illegal at common law. The determination of this issue involves the question of the severability of trade union objects, for the existence of some objectionable rules does not necessarily render the whole society one in illegal restraint of trade.

In what circumstances, then, are the individual rules or purposes of a trade union in undue restraint of trade? It is now certain that *Farrer* v. *Close*, in so far as it held that the practices of a trade union may be taken into account in deciding on its status at common law, was wrongly decided.[4]

It has been laid down that the Court is:

> not bound by either the preliminary statement of its objects or by the rules taken separately; we must look at the two together in order to see what the real object and scope of the association is.[5]

The construction of the rules is a matter for the Court and not for the jury,[6] and it seems that any evidence with regard to the mode in which the rules have been applied cannot be relevant on the question

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[1] S. 23 defines a trade union as: "such a combination, whether temporary or permanent, for regulating the relations between workmen and masters, or between workmen and workmen, or between masters and masters, or for imposing restrictive conditions on the conduct of any trade or business, as would, if this Act had not been passed, have been deemed to have been an unlawful combination by reason of some one or more of its purposes being in restraint of trade. . . ."

[2] *Howden's Case*, 1905, A. C. 256, at pp. 275–279; *M'Kernan's Case*, 1874, 1 R. (C. of S.) 453; *Aitken's Case*, 1885, 12 R. (C. of S.) 1206.

[3] *Gozney's Case*, 1909, 1 K. B. at p. 915, *per* Cozens-Hardy, M.R. This was recognised by the Trade Union Act Amendment Act, 1876, which by s. 16 amended the definition contained in s. 23 of the main Act by striking out the requirement that the combination should have such purposes as would be in illegal restraint of trade at common law. See *Russell's Case*, 1912, A. C. at p. 440, *per* Lord Robson.

[4] See *Farrer* v. *Close*, 1869, 4 Q. B. 602, *per* Cockburn, C.J., and Blackburn, J.

[5] *Chamberlain's Wharf, Ltd.* v. *Smith*, 1900, 2 Ch. at p. 611.

[6] *Russell's Case*, 1910, 1 K. B. at p. 521, *per* Farwell, L.J.; and *Mudd's Case*, 1910, 26 T. L. R. 518, *per* Coleridge, J.

of their construction.[1] This, of course, does not affect cases where there are no written rules or objects, and where the rules can only be gathered from evidence as to the union's activities. Probably, too, evidence as to practices might be admissible, if it appeared that the rules of the union were a false indication of the real purposes of the union—a cloak to cover their illegality,[2] and evidence may be received to aid in deciding whether the restraint involved in the rules is or is not unreasonable (*e.g.* evidence of what is customary in the trade).[3] There must be a clear indication of illegality in the rules, and the fact that the rules are difficult to construe, or are not complete in working out the powers of the society (*e.g.* with regard to striking), does not justify a presumption of illegality.[4] A covenantee who has derived an advantage from an illegal restraint is not, it seems, debarred from setting up the illegality in order to bar the enforcement of the covenant.[5]

The principles which underly the doctrine of restraint of trade apply in the main to trade union agreements. Not all the purposes of a trade union which are to some extent in restraint of trade are illegal in the sense of void and unenforceable. They are legal if they are calculated to give fair protection to the interests of the covenantee, and do not unduly interfere with the general interests of the public.[6] But, "restraint of trade which is unreasonable, oppressive, and destructive of individual liberty is unlawful."[7]

A few examples may serve to distinguish illegal from legal agreements of trade unions. A rule asserting that the society is a trade union is not in itself illegal,[8] nor is a rule authorising the union to regulate the relations between workmen and masters,[9] nor the well-known rule authorising the executive of the union to sanction trade

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[1] *Ibid.*; also *Osborne's Case*, 1911, 1 Ch. at p. 556.

[2] See *Farrer* v. *Close*, *per* Hannen and Hayes, JJ.

[3] *Russell's Case*, *loc. cit.*

[4] *Osborne's Case*, 1911, 1 Ch. 540, at p. 572, *per* Buckley, L.J.

[5] Trade unions are often obliged to do this on account of the peculiar nature of the operation of Sections 3 and 4 of the Act of 1871. In one case, even, a covenantor who had been subject to a commercial restriction applied to the Court to enforce it, pleading that it was not illegal at common law (*Evans* v. *Heathcote*, 1917, 2 K. B. 336).

[6] *Swaine* v. *Wilson*, 24 Q. B. D. at p. 263, *per* Lopes, L.J.

[7] 1912, A. C. at p. 430, *per* Lord Macnaghten. An agreement which is in illegal restraint of trade is not made legal and enforceable because it is intended as a counter-move to another similar agreement. *Hilton* v. *Eckersley* (106 R. R. 516) is no longer good authority for the proposition that a third person can set up the illegality of a contract, which is in undue restraint of trade, while the parties are willing and continue to act upon it. (*Mogul Case*, 1892, A. C. at p. 42.)

[8] *Gozney's Case*, 1909, 1 K. B. 901.

[9] *Ibid.*

movements for the purpose of preventing any reduction of wages or extension of hours or of obtaining any increase of wages, or of removing unjust and oppressive conditions of employment.[1] Likewise, a rule stating the objects of the society (*e.g.* to raise funds for the advancement and protection of the trade, for the mutual support of its members in case of sickness, accident, unemployment, etc.), has been held to be legal.[2] Again, rules empowering a union to promote the submission of disputes to arbitration or conciliation are not illegal. On the other hand, a rule that no member of a union should employ any traveller who had left the service of another member without the written consent of his late employer, until after the lapse of a certain period of time, has been held to be illegal,[3] because there was no limitation as to space, and no question of trade secrets, and no proof that the work in question required a high degree of skill. Another instance of an illegal rule is one providing that any journeyman binding his son in a shop which employed non-unionists should be fined, and deprived of his benefits until the fine was paid.[4] Rules which restrain the freedom of members to contract as to the conditions of their service (*e.g.* rules forbidding members to work out-of-doors or at home or at night,[5] or to work at a shop which is on strike or lock-out),[6] are generally held to be illegal if they carry some sanction in the form of a fine or expulsion. Rules giving to the executive of a union power to fine or expel a member who works under a co-partnership system, under which the operatives hold only a minority of shares, seem to be illegal.[7] Many of the rules which embody the main objects of price-fixing and production-regulating associations are in illegal restraint of trade.[8] Some associations of this kind lie on the border-line between trade unions and societies of other types.

Where the rules of a trade union provide for the support or furtherance of strikes, unless there is some clear indication that those strikes will involve criminal or civil wrongs, the whole society is not necessarily thereby tainted with illegality.[9] Where the rules relate to

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[1] *Osborne's Case*, 1911, 1 Ch. 540; *Kelly's Case*, 112 L. T. 399; 113 L. T. 1055.

[2] *Old* v. *Robson*, 1890, 62 L. T. 282.

[3] *Mineral Water Bottle . . . Socy.* v. *Booth*, 1887, 36 Ch. D. 465.

[4] *Rigby* v. *Connol*, 1880, 14 Ch. D. 482.

[5] *Cullen* v. *Elwin*, 1903, 88 L. T. 686; 1904, 90 L. T. 840.

[6] *Russell's Case*, 1912, A. C. 421; *Mudd's Case*, 1910, 26 T. L. R. 518; *Thomas's Case*, 1912, 28 T. L. R. 372; *Kelly's Case*, 112 L. T. 399; 113 L. T. 1055.

[7] *Braithwaite's Case*, 1922, 2 A. C. 440.

[8] *Evans* v. *Heathcote*, 1917, 2 K. B. 336; 1918, 1 K. B. 418; *Urmston* v. *Whitelegg*, 55 J. P. 453; *Chamberlain's Wharf, Ltd.* v. *Smith*, 1900, 2 Ch. 605; *McEllistrim's Case*, 1919, A. C. 548.

[9] Strikes are dealt with in a special chapter, *post*, p. 154.

strikes which are not *ex facie* actionable or criminal, the test lies in the degree of assistance to strikes which the rules authorise.[1] A rule providing for the payment of strike benefit money, though it may facilitate a strike, is not, if it stand alone, in illegal restraint of trade. Illegality may arise, however, when there are provisions for the making or enforcing of agreements to leave work, such that the society may be said to be maintaining, organising or directing strikes.[2] Words such as "encouraging," "promoting," and "sanctioning" are dangerously vague, unless this further test be borne in mind—do the members agree to submit their own action to the decision of others, and to strike or not as directed? There is no illegality in the power to organise and control strikes in which the strikers have voluntarily left work and may freely resume. Moreover, it seems that a mutual obligation not to work, embodied in a rule, may be binding if it is reasonable under all the circumstances,[3] but the existence of a penalty, in the form of a fine or expulsion, to enforce this obligation, is strong evidence of excessive restraint.

A trade union should have the right, if it act *bona fide* and reasonably for the protection of its funds, to decide to whom it will pay benefits and when those benefits shall cease. Thus, a rule satisfies this principle which provides that should work be offered at the current rate of wages to any member receiving travelling relief, unless it be to fill the place of men on strike, and he refuse to accept it, his allowance of relief should be stopped.[4] Generally speaking, the object of rules for the payment of strike pay is only insurance against loss of wages in strikes by mutual provision. On the other hand, rules providing that no strike should be engaged in without the union executive's sanction, and prescribing the mode of conduct and duties of the executive or members during a strike or lock-out, coupled with the power in the governing body to inflict penalties for the breach of such rules, are illegal.[5] Again, a rule empowering the union committee to compel members to strike, backed where necessary by punitive sanctions, is illegal.[6] The coercive nature of a rule is clear where, for breach of it, a member may lose his right to provident benefits. Rules relating to the promotion and conduct of strikes may,

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[1] See *Denaby . . . Collieries Case*, 1906, A. C. 384; *Farrer* v. *Close*, 1869, 4 Q. B. 602, *per* Hannen, J.

[2] See *Sayer* v. *Amalgamated Society of Carpenters and Joiners*, 19 T. L. R. 122.

[3] See *Russell's Case*, 1910, 1 K. B. 506 (C. A.), at p. 527, *per* Kennedy, L.J.

[4] *Swaine* v. *Wilson*, 1890, 24 Q. B. D. 252; and *Gozney's Case*, 1909, 1 K. B. 901.

[5] *Old* and *Robson*, 62 L. T. 282; *Sayer's Case*, 1902, 19 T. L. R. 122.

[6] *Russell's Case*, 1910, 1 K. B. 506, 1912, A. C. 421; see 1910, 1 K. B. at p. 523, *per* Farwell, L.J.; *Mudd's Case*, 1910, 26 T. L. R. 518.

however, be drawn in such a manner as to be perfectly legal. This was effected by the society concerned in *Osborne's Case*,[1] where the absence of compulsion to leave work, and the absence of forfeiture of provident benefits in cases of disobedience, were distinguishing features. The rules permitted striking in the last resort, after negotiation and offer to submit the dispute to arbitration had failed, and a ballot had been taken which declared in favour of striking.

Severance of the Legal Objects of Trade Unions

A trade union has invariably certain rules which are legal and generally others which are illegal. The principal issue in each case, for purposes of Sections 3 and 4 of the Trade Union Act, 1871, is whether or not the illegal rules are such as to taint with their own vice the society as a whole, so as to prevent the Court, if the Act had not been passed, from enforcing not only the illegal rules but also those which in themselves are legal at common law. In practice, the broad principle holds that a trade union whose provident and friendly society purposes can be entirely separated from its militant purposes will not as a whole be regarded as an illegal society at common law, and its legal purposes will be legally enforceable and unaffected by Section 4 of the Act of 1871. On the other hand, one whose militant purposes (which as a rule are in undue restraint of trade) are inextricably mixed with objects which taken alone are legal, will be regarded as a whole as an illegal society, so that all its purposes, legal or illegal at common law, will be subject to the restrictions imposed by that section.

The principles which govern the severability of legal from illegal purposes of trade unions have not always been precisely defined. A distinction has generally been drawn between subsidiary rules and rules embodying the main object of the union, and the principle laid down that the legal rules are only enforceable if the illegal rules do not go to the real or main object of the society.[2] One defect of this reasoning, however, is that it is not always easy to divide a set of rules into principal and subsidiary, especially where the friendly society activities seem to be as vital an object of the union as the militant objects. It is perhaps preferable to inquire whether the legal objects are clearly separate, in that they are worked independently, or whether the illegal purpose is " so interconnected and indispensable to the rest as

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[1] 1911, 1 Ch. 540. See also *Howden's Case*, 1905, A. C. 256, where the rules were very similar to those in *Osborne's Case*, but the point of their legality was not taken.

[2] *Swaine* v. *Wilson*, 24 Q. B. D. 252 ; *Russell's Case*, 1910, 1 K. B. at p. 516, *per* V.-Williams, L.J. ; *Mudd's Case*, 26 T. L. R. at p. 519.

to carry its vicious character through the whole system."[1] Severance would be possible if there were two distinct sets of rules constituting two distinct contracts, with separate funds applicable respectively to legal and illegal purposes, exclusively each of the other.[2] The courts must, however, take care not to create a new and valid contract for the parties out of one which is, as a whole, in illegal restraint of trade.[3]

Where the rules authorise the executive of a union to fine or expel members for the breach of illegal rules which give authority to promote strikes, so as to deprive such members of their rights to provident benefits secured to them by their contributions, then this is almost conclusive that the illegality taints the whole society and that the two sets of rules are inextricable.[4]

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[1] *Cullen* v. *Elwin*, 90 L. T. 840, at p. 842, *per* Collins, M.R. And see 1909, 1 K. B. at p. 920, *per* Fletcher Moulton, L.J.

[2] *Russell's Case*, 1910, 1 K. B. at p. 523, *per* Farwell, L.J.

[3] *Putsman* v. *Taylor*, 1927, 1 K. B. 637.

[4] *Old* v. *Robson*, 62 L. T. 282. That this decision is consistent with *Swaine* v. *Wilson* (1890, 24 Q. B. D. 252) was affirmed in *Russell's Case* (1910, 1 K. B. 506; 1912, A. C. 421), where it was said that the fact of the friendly society funds not being completely separated from trade funds goes far to show that the main object of the society is that of a trade union rather than that of a friendly society. See also *Knowles* v. *Booth* (1884, 32 W. R. 432). In one case, one rule alone operated to render the whole constitution illegal, viz. a rule that it should be an offence against the union punishable by expulsion for any member to assist an employer, whose workpeople might be on strike, even though the full wages were offered and the persons on strike did not belong to that union (*Kelly's Case*, 112 L. T. 399; 113 L. T. 1055).

CHAPTER II

TRADE UNIONS AND THE LAW OF CONTRACTS—continued

Trade Union Agreements

Having discussed the common law doctrine of restraint of trade in relation to trade unions, it is now possible to define the status of trade union agreements and trusts, and the extent to which they are affected by Sections 3 and 4 of the Trade Union Act of 1871. A trade union, whether registered or not, is itself the creature of agreement. The agreements to which its members are parties and the trusts on which its property is held, are generally to be found in the declared objects and rules embodied in the constitution of the union, or, where there is no written constitution, are to be inferred from the practices of the union.[1] Agreements may also exist between one trade union and another, and between a trade union and individuals who are not members of the union (*e.g.* an agreement with an employer).

If a trade union is not in illegal restraint of trade at common law, its agreements and trusts are not affected by Sections 3 and 4 of the Act of 1871;[2] but at the same time, the courts will not enforce those of its rules which, taken alone, are in illegal restraint of trade, or illegal or unenforceable on some other ground. Trade union agreements and trusts which would be illegal at common law, on the ground that the trade union concerned is in illegal restraint of trade, are rendered valid by the operation of Sections 2 and 3 of the Act of 1871, and unless they are covered by the terms of Section 4, or are illegal or unenforceable on some other ground, Section 4 imposes no restriction on their enforceability at law or in equity.[3] Such limita-

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[1] *Osborne's Case*, 1911, 1 Ch. at p. 567, *per* Buckley, L.J.

[2] *I.e.* unless the judgments of Lord Atkinson and Earl Loreburn, L.C., in *Russell's Case*, have altered the law on this point. See *ante*, p. 69.

[3] The basis of the member's right to sue on any such enforceable agreement is the possession of an interest in the property of the union, an interest which includes many rights which are not strictly rights of property. (*Rigby* v. *Connol*, 14 Ch. D. at p. 487; *Braithwaite's Case*, 1922, 2 A. C. at p. 448.) The funds belong to

tions as Section 4 places on the enforceability of certain types of trade union agreements affect such agreement only if the union is in illegal restraint of trade at common law.[1]

Section 4 provides that "nothing in the Act shall enable[2] any Court to entertain any legal proceeding instituted with the object of directly enforcing or recovering damages for the breach of" any of certain specified agreements.

The restrictions imposed by Section 4 on the jurisdiction of the courts have been construed very narrowly, on the principle that the section should not be so interpreted as to cover every agreement validated by Section 3.[3] Nevertheless, it cannot be said that the various constructions placed on Section 4 are entirely reconcilable. The chief difficulty arises in defining the nature and scope of legal proceedings which might be said to have the object of "directly enforcing" any of the specified agreements. And is indirect enforcement of any such agreement permitted by Section 4? It has been suggested that the use of the word "directly" does not imply that the Court may indirectly enforce, in the sense that it may make an order which, by indirect means, will have the effect of enforcing in fact.[4]

In *Osborne's Case*,[5] Fletcher Moulton, L.J., gave a valuable summary of the effect of Section 4:

> The only disabilities, therefore, under which a trade union or its members lie relate to the enforcement of contracts and not to their validity. . . . If the limitations to the action of the courts contained in s. 4 be closely looked at, it will be found that they leave untouched the jurisdiction of the courts to pronounce on the meaning or validity of any contract whatever. It must be borne in mind that since the Judicature Act the courts have jurisdiction to make declarations without granting consequential relief, and even when consequential relief is not asked. S. 4 only limits the jurisdiction to give relief of certain types in certain cases. It affords no bar to any party who claims to be interested in contracts which are

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the members either as *cestuis que trust* or as legal co-owners. It seems that they are even entitled to a distributive share of the assets in the event of a dissolution of the union. (*Re Printers . . . Society*, 1899, 2 Ch. 184.) A member's right to vote may be regarded as "property." (*Pender* v. *Lushington*, 1877, 6 Ch. D. 70; see 1911, 1 Ch. at p. 567.) The fact that certain rights in respect of such beneficial interest as members possess are not enforceable by reason of s. 4, does not affect the right to sue on an enforceable right.

[1] See *ante*, p. 69; *Russell's Case*, 1912, A. C. 421; *Burke's Case*, 1906, 2 K. B. 583.

[2] See *ante*, p. 68.

[3] 1905, A. C. at p. 261, *per* Lord Halsbury.

[4] 1905, A. C. at p. 264, *per* Lord Macnaghten; *Braithwaite's Case*, 1922, 2 A. C. at pp. 455, 469.

[5] 1911, 1 Ch. at pp. 558–561.

> legally valid coming to the courts to obtain a pronouncement as to his rights thereunder. Such a pronouncement leaves those rights enforceable or not according as they do not or do come within the exceptions of s. 4.

Proceedings to recover damages for the breach of agreements coming within Section 4 have failed in several cases.[1]

The meaning of "direct enforcement" will now be discussed with reference to the various agreements specified in Section 4.

Section 4 (1) reads :

> any agreement between members of a trade union as such, concerning the conditions on which any members for the time being of such union shall or shall not sell their goods, transact business, employ, or be employed.

In *Smith* v. *Scottish Typographical Association*,[2] after a lock-out of all the employees in a workshop who were members of a certain trade union, the union concerned passed a resolution that the lock-out should affect all, including foremen. One foreman was expelled from the union for working during the lock-out, and though later reinstated, he lost the benefits due in respect of his former membership. It was held that Section 4 excluded his suit for a declarator and interdict, because although he sought only restoration to membership, that could only be granted by considering an agreement coming within Section 4 (1). This may be contrasted with the later case of *Johnston* v. *Aberdeen Master Plumbers' Association*.[3] A rule of the association provided that any member, upon his dissolving partnership or ceasing business in Aberdeen, should thereupon cease to be a member of the association. In a suit for a declarator that he was still a member, and entitled to all the privileges and benefits of membership, the Court held that this question of qualification for membership was not a question of enforcing an agreement coming within Section 4 (1), but was antecedent to any such question, and was therefore not excluded. The Court then proceeded to construe the rules.[4]

Section 4 (2) reads :

> Any agreement for the payment by any person of any subscription or penalty to a trade union.

In *Mullett* v. *United French Polishers' London Society*,[5] it was

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[1] *Kelly's Case*, 112 L. T. 399, 113 L. T. 1055 ; *Rigby* v. *Connol.*

[2] 1919, S. C. 43 ; see *Chamberlain's Wharf* v. *Smith*, 1900, 2 Ch. 605.

[3] 1921, S. C. 62.

[4] Other agreements alleged to come within s. 4 (1) were considered in *Braithwaite's Case*, 1922, 2 A. C. 440 ; *Mineral Water Bottle . . . Society* v. *Booth*, 36 Ch. D. 465.

[5] 1904, 20 T. L. R. 595.

held that to grant an injunction to restrain a trade union from levying certain fines imposed on some of its members for supporting a non-unionist, would involve a direct enforcement of an agreement coming within Section 4.[1] This decision is difficult to explain [2] in view of the later case of *Blackall* v. *National Union of Foundry Workers.*[3] The plaintiff seems to have been expelled for the breach of a rule which contained an agreement within Section 4 (2), whether relating to subscriptions or fines is not certain. He sued for an injunction and to secure reinstatement to membership. Coleridge, J., took a very narrow view of Section 4, deciding that here no direct enforcement of an agreement within Section 4 (2) was sought. He said :

> If the result is not directly to enforce payment of the contribution, the jurisdiction is not ousted. Not to construe the word "directly" in its strict sense would be to expunge the word from the statute. . . . The Court is at liberty to construe the rules so as to see whether the jurisdiction is ousted. . . . If the Court is asked to enforce directly any such agreement, the Court must refuse to interfere, and cannot inquire into the justice or injustice, the rights or wrongs of the case.[4]

Section 4 (3a) reads :

> Any agreement for the application of the funds of a trade union to provide benefits to members.

The clearest cases of suits directly to enforce an agreement of this kind are those in which the Court is asked to make an order to compel a trade union to pay benefit moneys due under its rules, or to administer the funds of a union in which members are beneficially interested under the rules.[5] These cases correspond to those which are excluded by Section 4 (2)—suits by a union to compel a member to pay subscriptions or fines due from him.

Less certainty attaches to cases where something less than participation in the funds or their administration is claimed. The essential precaution is to notice exactly what the plaintiff is claiming, and what is the object, primary or ulterior, of the suit. The present uncertainty rests especially on the fact that the expression "direct enforcement" has sometimes been interpreted in a narrow sense, sometimes in a wide sense. The stricter interpretation now tends to prevail.

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[1] Whether reference was intended to s. 4 (1) or s. 4 (2) is not clear.

[2] As is *Rae* v. *Plate Glass Merchants' Association* (1919, S. C. 426), in which an interdict restraining the enforcement of the payment of a fine was sought.

[3] 1923, 39 T. L. R. 431.

[4] *Ibid.* at p. 432. Cf. *Brodie* v. *Bevan, Dunn* v. *Bevan,* 1921, 38 T. L. R. 172.

[5] *E.g. Gozney's Case,* 1909, 1 K. B. 901 (sick benefits) ; *Burke's Case,* 1906, 2 K. B. 583 (unemployment benefits).

There are three main classes of cases to which it has been sought to apply Section 4 (3a), and they are not easy to separate :

(*a*) suits to restrain the misapplication of the funds of a trade union in violation of its rules ;

(*b*) suits seeking to secure the restoration of a person to membership of a union following an alleged wrongful expulsion ;

(*c*) suits to obtain a judicial construction of the rules of trade unions and a decision whether certain acts have infringed the rules.

Rigby v. *Connol* is usually regarded as the prime cause of the conflict.[1] The plaintiff disputed the regularity of his expulsion from his union for breach of a rule relating to apprenticeship, and claimed to be entitled to share in the benefits of the union, and that the union should be restrained from excluding him from participating therein. The action failed for want of jurisdiction. The decision itself has never been questioned, because the claim was so wide as to seek participation in and administration of the funds, virtually a direct enforcement of an agreement coming within Section 4 (3a). Certain dicta of Sir George Jessel, M.R., however, have been widely criticised. The courts have too readily assumed that these dicta imply that a declaration that the plaintiff was entitled to be restored to membership, and an injunction accordingly, would be a direct enforcement of an agreement within Section 4 (3a).[2] Some later decisions have interpreted these dicta in this way and expressed agreement with them.[3] But the better view[4] is that the dicta are inaccurate, unless they were really intended only to apply to the facts of *Rigby* v. *Connol*.

It is now settled that the Court may grant an injunction to restrain a trade union from carrying out an amalgamation with another union in violation of its rules,[5] or to restrain a trade union or some of its members from misapplying union funds in violation of its rules.[6] By so doing it would not be directly enforcing an agreement within Section 4 (3a). Thus, where a branch society of a trade union passed a resolution to secede from the parent body and distribute the funds in its control among the members of the branch, the Court had

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[1] 1880, 14 Ch. D. 482.

[2] Jessel, M.R., said, at p. 490 : " If I decide in favour of the plaintiff, I directly enforce that agreement, because I declare him entitled to participate in the property of the union, . . . and I restrain the society from preventing that participation."

[3] *Chamberlain's Wharf* v. *Smith, loc. cit.; Duke* v. *Littleboy*, 1880, 49 L. J. Ch. 802 ; *Aitken's Case*, 1885, 12 R. (C. S.) 1206.

[4] Expounded in *Wolfe* v. *Matthews*, 1882, 21 Ch. D. 194 ; and in *Howden's Case*, 1905, A. C. 256. See *Cope* v. *Crossingham*, 1909, 2 Ch. 148 ; *Osborne's Case*, 1911, 1 Ch. 540.

[5] *Wolfe* v. *Matthews, loc. cit.*

[6] *Howden's Case, loc. cit.*

jurisdiction to grant a declaration that the resolution was *ultra vires* and an injunction to restrain the distribution; but it did not have jurisdiction to make an order for the payment to the head trustee of the funds of the branch, because that would involve a direct enforcement of an agreement within Section 4 (3a)—viz. administration of the branch funds.[1] In another case, the Court, acting on its construction of the rules of a trade union, granted a declaration (without further remedy) that a resolution of the union executive granting strike pay to certain members was *ultra vires* the union.[2]

With regard to actions seeking the restoration of members to membership, in *Osborne's Case* the plaintiff (who had been expelled from his trade union for suing it in the better known "Osborne Case") sued the union asking for reinstatement on the ground that his expulsion was *ultra vires* and void.[3] It was held that Section 4 (3a) did not bar this action, because the plaintiff was merely seeking to be restored to membership, and not to compel the union to allow him to participate in its funds. If restored to membership, his right to participate in the funds would still be unenforceable by reason of Section 4 (3a).[4] It appears to be the correct view since *Braithwaite's Case*,[5] that so long as the plaintiff claims merely to be restored to membership, the Court may make a declaration that the expulsion is invalid, and grant an injunction accordingly, even though the expulsion may have been for an alleged breach of a rule falling within Section 4 (1). In *Braithwaite's Case*, a joint committee of two unions had issued to their branches a notice that any member participating in a certain kind of profit-sharing scheme must be excluded from the society. It was held by the House of Lords that Section 4 (3a) did not bar a suit for an injunction to restrain the union from carrying out its threat.[6] After this case, *Rigby* v. *Connol* and the cases which follow it seem supportable only on the assumption that the plaintiffs in those cases were seeking something more than

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[1] *Cope* v. *Crossingham*, 1909, 2 Ch. 148; see also *Sansom's Case*, 1920, 36 T. L. R. 666.

[2] *Re Durham Miners' Association*, 1900, 17 T. L. R. 39; *Alfin* v. *Hewlett*, 18 T. L. R. 664.

[3] 1911, 1 Ch. 540; see also *Kelly's Case*, 112 L. T. 399; 113 L. T. 1055.

[4] 1911, 1 Ch. 540, at p. 554, *per* Cozens-Hardy, M.R.; and *ibid.* at p. 559, *per* Fletcher Moulton, L.J., and at p. 568, *per* Buckley, L.J.

[5] 1922, 2 A. C. 440. See dicta of Buckley, L.J., in *Osborne's Case*, 1911, 1 Ch. at p. 570, as to the effect of *Rigby* v. *Connol* and *Chamberlain's Wharf, Ltd.* v. *Smith*, which were wrongly understood in some later cases (*Smith* v. *Scottish Typographical Association*, 1919, S. C. 43; *Mullett's Case* and *Rae's Case*, for which, see *ante*, p. 82), but were more fully explained by Buckley, L.J. (then Lord Wrenbury), in *Braithwaite's Case*, *ibid.*, at pp. 467–8.

[6] See 1922, 2 A. C. at pp. 454, 469.

restoration to membership, and were in fact claiming to participate in the benefits and privileges of membership, or to enforce some other agreement covered by Section 4. If that be the correct view, the argument that these cases may be explained on the ground that the Court was being called upon to construe agreements within Section 4 will, it seems, be inadequate, since it is only tenable if the claim is to a direct enforcement of such an agreement.[1] At the same time, it must not be overlooked that to ask for an injunction instead of a decree of specific performance does not necessarily exempt a claim from the application of Section 4.[2] It has been said that the question whether relief by way of injunction is a method of direct enforcement of an agreement does not admit of a comprehensive reply, and that all depends on the circumstances.[3]

Section 4 (3b) reads :

> Any agreement for the application of the funds of a trade union to furnish contributions to any employer or workman not a member of such trade union, in consideration of such employer or workman acting in conformity with the rules or resolutions of such trade union.

Section 4 (3c) reads :

> any agreement for the application of the funds of a trade union to discharge any fine imposed upon any person by sentence of a court of justice.

No cases have been decided on these sub-sections.

Section 4 (4) reads :

> Any agreement made between one trade union and another.

The difficulties presented by this clause were considered in *McLuskey* v. *Cole*,[4] where the officials of one trade union sued the officials of a Federation of which that trade union was a constituent member, asking for a declaration that a resolution of the Federation to expel the trade union from membership was invalid, and that the trade union was still a member of the Federation, and for an injunction accordingly. It was held that there was an agreement between one trade union and another within Section 4 (4), which barred the suit, because it sought the direct enforcement of such an agreement.[5] Section 4 (4) is worded so widely that it seems correct to say that an

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[1] 1922, 2 A. C. at p. 468, *per* Lord Wrenbury.

[2] See *Lumley* v. *Wagner*, 1852, 1 De G. M. & G. 604. The distinction appears on a comparison of the nature of the injunctions sought respectively in *Rigby* v. *Connol*, and *Osborne's Case* or *Braithwaite's Case*.

[3] 1922, 2 A. C. at p. 451, *per* Lord Buckmaster, L.C.

[4] 1922, 1 Ch. 7.

[5] See 1922, 1 Ch. 7, at p. 13, *per* Lord Sterndale, M.R.

injunction to restrain the Federation from breaking the contract of membership would be substantially a direct enforcement of such a contract, and that there is no analogy between this case and one such as *Osborne's Case*,[1] because while Section 4 (4) strikes at all agreements between one trade union and another, the contract of membership in the latter case was that of an individual member of one trade union.

Section 4 (5) reads :

> any bond to secure the performance of any of the above-mentioned agreements.

No case has been decided on this sub-section.

More general instances may be given of suits in which the jurisdiction of the Court was not ousted by Section 4. In one case,[2] the Court affirmed the right of persons interested in the property of a trade union to inspect the books and accounts by a chosen accountant. The members of a trade union are, it has been suggested, entitled to a distributive share of the assets of the union on a winding-up, and can sue therefor despite Section 4 (3a),[3] and the Court will direct the manner in which the funds should in the particular dissolution be distributed among the members.[4] It has also been asserted that new trustees of a trade union or branch union can, in spite of Section 4, maintain an action to recover any property of the union in the hands of the old trustees.[5]

The Nature of the Agreements specified in Section 4

It is to be noted that the agreements, the enforceability of which is limited by Section 4, are not all such as at common law would in themselves be in illegal restraint of trade.[6]

Section 4 (1).—It has been said that the words "shall or shall not . . . employ or be employed," refer to agreements between members of a trade union as to the conditions of employment, and not as to whether a member shall or shall not be employed ; they refer to conditions of employment in regard to such things as wages, hours, and bonds or arrangements between employer and employee. "They are not conditions upon which a man shall seek employment or return to his trade, but are the conditions of his employment when he

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[1] 1911, 1 Ch. 540.

[2] *Norey* v. *Keep*, 1909, 1 Ch. 561.

[3] *Osborne's Case*, 1911, 1 Ch. at p. 567, *per* Buckley, L.J.

[4] *Re Printers . . . Society*, 1899, 2 Ch. 184 ; see also *Cunnack* v. *Edwards*, 1896, 2 Ch. 679 ; and *Strick* v. *Swansea Tin-Plate Co.*, 36 Ch. D. 558.

[5] 1909, 2 Ch. 148, at p. 159, *per* Cozens-Hardy, M.R.

[6] Notably, most agreements within s. 4 (3a) would not be.

is actually employed."[1] This strict interpretation would seem to exclude from the operation of Section 4 (1) such a rule of a trade union as one which, for example, provides that the members shall not take employment at a shop where work is done by piece. Such rules are surely intended to be unenforceable, but sub-section 1 seems to be the only one which may possibly make them unenforceable.[2]

A rule of a society that any member who worked under a certain co-partnership system should be liable to a fine or expulsion, has been held not to come within Section 4 (1), because the co-partnership system did not apply to the conditions of labour; it was independent of wage-rates, which were fixed and paid at full trade union standards.[3]

Section 4 (2).—This was intended to strike at suits brought by trade unions to enforce the payment of moneys due from members as fines, contributions or subscriptions; but it affects not merely members of a trade union, for it speaks of "the payment by any person." The sub-section does not, it appears, extend the meaning of the word "penalty"; it may even be that it does not comprise all things which would be penalties at common law.[4] In one case, it was held that an agreement that on his return to work a member who had received £100 by way of incapacitation benefits should refund that sum, did not involve a penalty, but only a contract for a conditional payment.[5]

Section 4 (3a).—The peculiar language of Section 4 (3a) should be noted. Lord Macnaghten has said that after Section 4 (2):

> one would expect to find next some such clause as this—"any agreement for the payment to any member of any benefit assured by the rules of the trade union," . . . a clause pointing to a personal benefit conferred on a member, . . . It no doubt includes that, but I think it goes much further. . . . I cannot help thinking that it comes from the apprehension which the leaders of the workmen then felt of the extreme danger to their combinations which might result from any attempt to separate the funds of the union.[6]

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[1] *Baker* v. *Ingall*, 1911, 2 K. B. at p. 139, *per* Phillimore, J. The Court of Appeal, which reversed the decision of the Divisional Court, did not question these dicta (1912, 3 K. B. 106).

[2] The decision in *Smith* v. *Scottish Typographical Assen.*, 1919, S. C. 43, seems inconsistent with the dicta of Phillimore, J.

[3] *Braithwaite's Case*. Other instances of agreements within s. 4 (1) occurred in *Chamberlain's Wharf* v. *Smith*, 1900, 2 Ch. 605; *Evans* v. *Heathcote*, 1918, 1 K. B. 418; *Johnston* v. *Aberdeen Master Plumbers' Assn.*, 1921, S. C. 62.

[4] *Baker* v. *Ingall*, 1911, 2 K. B. at p. 140, *per* Phillimore, J.

[5] *Baker* v. *Ingall*, C. A. 1912, 3 K. B. 106, reversing decision of the Divisional Court, but not criticising the dicta of Phillimore, J.

[6] 1905, A. C. at p. 264; see also *Osborne's Case*, 1910, A. C. at p. 95; *Taff Vale Case*, 1901, A. C. at p. 437; *Russell's Case*, 1912, A. C. at p. 441.

Thus, we find that Section 4 (3a) draws no distinction between strike benefits and friendly society benefits, and payment of either is not enforceable.

Proceeds of tickets sold by the members of a trade union for the maintenance of members out on strike, which were paid into the funds of the union on trust for such purposes have been held to constitute "funds" within the sub-section.[1] Examples of the kinds of benefits covered are accident and incapacitation,[2] sickness,[3] strike,[4] superannuation,[5] loss of tools,[6] and burial [7] benefits.

In one case it was held that Section 4 (3a) did not bar the enforcement of an implied promise by a trade union to indemnify a member against the costs of certain legal proceedings relating to workmen's compensation.[8] The distribution of the assets of a union on its dissolution does not appear to be an application of the funds to provide "benefits" to members within the sub-section.[9] In the *Osborne Case* the rules of the society providing for the accumulation and expenditure of a Parliamentary representation fund were held not to constitute an agreement within Section 4 (3a).[10]

Section 4 (3a) speaks only of benefits to members. Whether a certain benefit is a benefit to a member will depend on the nature of the rules and of the purpose for which the benefit is given. Thus, in one case, a rule that if a member became insane, his wife, or family or parent, if dependent on him, should be eligible to receive sick benefit money for one year, was held not to be an agreement for the application of the funds to provide benefits to a member, especially as the wife in this case was suing in her own right.[11] On the other hand, certain third parties are in no better position to sue than is a member. Thus, an action by the widow of a deceased member, suing as his administratrix, will as a rule be barred by Section 4 (3a).[12]

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[1] *Sansom's Case*, 36 T. L. R. 666.

[2] *Sayer's Case*, 19 T. L. R. 122; *Baker* v. *Ingall*, 1912, 3 K. B. 106.

[3] *Burke's Case*, 1906, 2 K. B. 583; *Gozney's Case*, 1909, 1 K. B. 901; *Russell's Case*, 1912, A. C. 421.

[4] *Swaine* v. *Wilson*, 24 Q. B. D. 252.

[5] *Cullen* v. *Elwin*, 88 L. T. 686.

[6] *Mudd's Case*, 1910, 26 T. L. R. 518.

[7] *McLaren's Case*, 1918, S. C. 834.

[8] *Lees* v. *Lancs. and Cheshire Miners' Federation*, *Times* newspaper, June 20th, 1906.

[9] *Osborne's Case*, 1911, 1 Ch. at p. 567; *Strick* v. *Swansea Tin-Plate Co.*, 36 Ch. D. 558.

[10] 1910, A. C. 87.

[11] *Love's Case*, 1912, S. C. 1078.

[12] *Burke's Case*, 1906, 2 K. B. 583; *Russell's Case*, 1912, A. C. 421; see also *M'Laren's Case*, 1918, S. C. 834; *Winder* v. *Guardians of Kingston-upon-Hull*, 1888, 20 Q. B. D. 412; *Crocker* v. *Knight*, 1892, 1 Q. B. at p. 708.

Where a member had brought an action for an interdict to restrain his union from applying funds to political purposes, it was held that after his decease his widow could not proceed with the action, because she had no interest in it.[1]

Sections 4 (3*b* *and* 3*c*).—There have been no decisions on these sub-sections.[2]

Section 4 (4).—The language of this clause is very wide—"any agreement between one trade union and another." Reference has already been made to *McLusky* v. *Cole*.[3] One difficulty in this case was whether one trade union could be a member of another trade union. It was held that the terms of Section 4 (4) are as wide as possible, and, moreover, that the Trade Union Act, 1913, in Section 3 (5) makes it clear that one trade union may be a combination of several trade unions. It was therefore held that the contract of membership of the plaintiff union in the Federation was an agreement within Section 4 (4).[4]

Section 4 (5).—No case has arisen on this sub-section.

In the case of *National Sailors' and Firemen's Union, etc.* v. *Reed*,[5] Astbury, J., asserted that no member of a trade union can lose his trade union benefits by refusing to obey unlawful orders. This dictum seems to overlook Section 4 of the 1871 Act, and to be only acceptable if the union concerned were not in illegal restraint of trade at common law. But now, the operation of Section 4 has been partially excluded by the Trade Disputes and Trade Unions Act, 1927, Section 2 (1) of which provides that :

> no person refusing to take part or to continue to take part in any strike or lock-out which is by this Act declared to be illegal, shall be, by reason of such refusal or by reason of any action taken by him under this section, subject to expulsion from any trade union or society, or to any fine or penalty, or to deprivation of any right or benefit to which he or his legal personal representatives would otherwise be entitled, or liable to be placed in any respect either directly or indirectly under any disability or at any disadvantage as compared with other members of the union or society, anything to the contrary in the rules of a trade union or society notwithstanding.

In order to render this provision effectual, it is further provided by Section 2 (2) of the same Act that :

> no provisions of the Trade Union Acts, 1871–1917, limiting the proceedings which may be entertained by any court, and nothing in the rules of

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[1] *Martin's Executrix* v. *M'Ghee*, 1914, S. C. 628.

[2] See, however, *Osborne's Case*, 1911, 1 Ch. at p. 558, *per* Fletcher Moulton, L.J.

[3] 1922, 1 Ch. 7 ; *ante*, p. 85.

[4] See also *Holland* v. *London Society of Compositors*, 1924, 40 T. L. R. 440.

[5] 1926, Ch. 536, at p. 540.

> a trade union or society requiring the settlement of disputes in any manner shall apply to any proceeding for enforcing any right or exemption secured by this section, and in any such proceeding the court may, in lieu of ordering a person who has been expelled from membership of a trade union or society to be restored to membership, order that he be paid out of the funds of the trade union or society such sum by way of compensation or damages as the court thinks just.[1]

The Act of 1927 also makes special provision for the bringing of suits to restrain the misapplication of funds of a trade union to purposes which are in contravention of Section 1 of that Act.[2] Section 7 provides that :

> without prejudice to the right of any person having a sufficient interest in the relief sought to sue or apply for an injunction to restrain any application of the funds of a trade union in contravention of the provisions of this Act, an injunction restraining any application of the funds of a trade union in contravention of the provisions of s. 1 of this Act may be granted at the suit or upon the application of the Attorney-General.

A few words are necessary as to the position of agreements, the enforceability of which is restricted by Section 4 of the 1871 Act. The section concludes : " but nothing in this section shall be deemed to constitute any of the above-mentioned agreements unlawful." Any such agreement may, of course, be unlawful on some other ground. The effect of Section 4 is merely that a contract to which it applies is not a void contract upon which no valid claim can arise, but is a valid contract upon which a valid claim can arise although that claim cannot be directly enforced nor can damages be recovered for the breach of the contract.[3] In other words, it appears to be an agreement of imperfect obligation. Fletcher Moulton, L.J., speaking more particularly of a contract within Section 4 (3a), said :

> To use the funds of the trade union for the purpose of making such a payment is neither *ultra vires* on the part of the officials of the trade union nor a breach of trust on the part of the trustees in whom those funds are vested. If the payments are made, they are in the eye of the law payments made for valid consideration and can under no circumstances be recovered back. . . . But if the trade union after making such agreement . . . chooses to refuse to make any of the stipulated payments, neither the aggrieved party nor any other person can compel it to do so. The law refuses its assistance in the matter, and thus in effect leaves it entirely at the option of the trade union whether it will or will not fulfil its engagement.[4]

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[1] The Trade Union Acts, 1871–1917, will, of course, include the limiting provisions of s. 4 of the 1871 Act. [2] See *post*, p. 160.

[3] *Evans* v. *Heathcote*, 1918, 1 K. B. at p. 427, *per* Pickford, L.J., and at pp. 435–6, *per* Scrutton, L.J.

[4] *Osborne's Case*, 1911, 1 Ch. at p. 558. See *Barclay* v. *Pearson*, 1893, 2 Ch. 154.

CHAPTER III

THE OBJECTS AND POWERS OF A TRADE UNION

(A) General Objects and Powers

The Trade Union Acts[1] have made it possible to distinguish between a registered and an unregistered trade union, and between a trade union which would, and one which would not, be in illegal restraint of trade at common law. The legal position of a trade union, no matter under which head it may be classed, has been drastically affected by these statutes. In respect of each class, the concession of privileges and immunities, and the imposition of disabilities, have created a fairly definite demarcation between a trade union and the great class of voluntary, unincorporated associations to which the law concedes no legal status apart from that of the individuals composing them. The distinction is none the less real because a trade union, even if registered, does not possess the status of a corporation or of a partnership.

The necessary task of providing a statutory definition was complicated because Parliament was not itself creating the "trade union"; it was merely granting a certain legal recognition, accompanied by the attribution of certain legal rights and duties, to a body which before 1871 had been, as a rule, an "outlaw." There is little doubt that the Legislature in 1871 set out to translate the popular conception of a trade union into legal language. This conception has been described as follows: a trade union prior to 1871

> was, speaking generally, an association of wage-earners for the purpose of improving or maintaining the conditions of their employment. It combined the objects of a friendly society with those of a trade guild. In the former capacity it gave relief to its members when out of work from sickness or accident, or on strike . . .; and in the latter capacity, it bargained with employers on behalf of all its members, and with the influence of a united body, for higher wages, shorter hours and the like.[2]

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[1] 1871–1927.

[2] *Osborne's Case*, 1909, 1 Ch. 163, at p. 189, *per* Farwell, L.J. This view was accepted by the House of Lords (1910, A. C. 87), though it met with strenuous

Section 23 of the Trade Union Act, 1871, appeared in form to be a definition of a trade union, rather than of the objects and powers of a trade union. It enacted that the term " trade union " :

> means such combination, whether temporary or permanent, for regulating the relations between workmen and masters, or between workmen and workmen, or between masters and masters, or for imposing restrictive conditions on the conduct of any trade or business, *as would, if this Act had not passed, have been deemed to have been an unlawful combination by reason of some one or more of its purposes being in restraint of trade :* [1] Provided, that this Act shall not affect—
>
> (1) any agreement between partners as to their own business ;
>
> (2) any agreement between an employer and those employed by him as to such employment ;
>
> (3) any agreement in consideration of the sale of the goodwill of a business or of instruction in any profession, trade, or handicraft.

The radical defect in this section became apparent when once it was admitted that a trade union might be legal at common law, and that the term " trade union " is a neutral term. For an association wishing to be registered under the 1871 Act as a trade union, had first to show that it would have been an unlawful combination at common law since it had one or more purposes in restraint of trade.[2] Therefore, by Section 16 of the Trade Union Act Amendment Act, 1876, Section 23 of the main Act was repealed, save for the proviso, and in lieu, it was enacted :

> The term " trade union " means any combination, whether temporary or permanent, for regulating the relations between workmen and masters, or between workmen and workmen, or between masters and masters, or for imposing restrictive measures on the conduct of any trade or business, whether such combination would or would not, if the principal Act had not been passed, have been deemed to have been an unlawful combination by reason of some one or more of its purposes being in restraint of trade.[3]

The proviso seems to emphasise that the Trade Union Acts exempt from the general law as to restraints on trade (to the extent indicated in Sections 2, 3 and 4 of the 1871 Act) only particular classes of relations between persons, and that the general law remains

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opposition from the representatives of labour, who maintained that, even in 1871, political action was a definite concern of trade unions (*Manchester Guardian*, September 17, 1910 ; speech by J. Ramsay MacDonald, M.P.).

[1] See *ante*, pp. 67, 73.

[2] *Russell's Case*, 1912, A. C. at p. 440, *per* Lord Robson ; *Gozney's Case*, 1909, 1 K. B. 901 ; *Osborne's Case*, 1911, 1 Ch. 540.

[3] This definition held good until 1913. The Trade Disputes Act, 1906, effected no substantial modification. (But see s. 5 (2).)

applicable to other classes of agreements, three of which are specified in the proviso.

Soon after the Trade Disputes Act, 1906, acute controversy arose over the question of the scope of the definition, in consequence of the expansion of trade union objects which followed the growth of the movement for labour parliamentary representation. In 1909, Osborne, a member of the Amalgamated Society of Railway Servants, a registered trade union, brought a suit for a declaration that certain rules of the society which authorised the raising by compulsory levies of funds for the securing of parliamentary representation for its members, were *ultra vires* the society, as being beyond the objects specified in Section 16 of the 1876 Act, and for an injunction to restrain the society from applying the funds so raised to such purposes. The House of Lords in the *Taff Vale Case* in 1901 [1] had held that though a registered trade union was not a corporation or a partnership, it was a legal entity, a species of quasi-corporation possessing certain attributes of corporate personality, all of which distinguished it from merely voluntary, unincorporated associations, including unregistered trade unions, which rest on consent.

The status of statutory trading and other corporations was defined in *Baroness Wenlock* v. *River Dee Co.*, in these terms :

> Whenever a corporation is created by Act of Parliament with reference to the purposes of the Act, and solely with a view to carrying those purposes into effect, I am of opinion not only that the objects which the corporation may legitimately pursue must be ascertained from the Act itself, but that the powers which the corporation may lawfully use in furtherance of these objects must be either expressly conferred or derived by reasonable implication from its provisions.[2]

Any act on the part of the corporation which overruns the bounds thus fixed is said to be *ultra vires* the corporation, and, on that account, illegal and void. This doctrine applies equally to a company established by a particular statute for certain defined purposes, as to a company established under the general provisions of the Companies Act.[3] The issue in *Osborne's Case*, then, was whether the statutory definition of a registered trade union, like the memorandum of association of a corporation, should be regarded as setting out the objects beyond which the union could not validly extend its interests, or whether the definition should be taken as descriptive, so that a trade union having among its objects any of those specified in the

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[1] 1901, A. C. 426.
[2] 10 A. C. 354, at p. 362, *per* Lord Watson.
[3] *Ashbury Carriage Co.* v. *Riche*, 1875, 7 H. L. 653.

definition might add to these any other objects not in themselves unlawful.[1]

Earlier decisions had leaned towards the wider interpretation of Section 16 of the Act of 1876. In 1901, in *Linaker* v. *Pilcher*,[2] where an action for libel was brought against a journal maintained by a registered trade union, it was held that Section 16 did not cut down the rights and powers of a trade union. In 1907, in *Steele's Case*,[3] it was held that the provision of a parliamentary representation fund was within the scope of the powers of a trade union if authorised by its rules; and that Section 16 was not exhaustive, and did not prevent a society from pursuing other objects, lawful in themselves, though outside those specified in Section 16.[4]

Osborne's Case, in 1910, disposed of the grounds of decision in *Steele's Case*. The Court of Appeal and the House of Lords declined to hold that the object of securing parliamentary representation was within the statutory definition as a means of regulating any of the relations specified therein, or was a benefit to members within Section 4 of the Act of 1871.[5] Moreover, the Court of Appeal and a majority of the House of Lords held that Section 16 was a limiting definition, with the qualification that it was not intended to exclude purposes or powers collateral to those therein specified, of such well-known types as the provision of benefits to members. The courts looked to the statutes for evidence of the nature of a trade union as contemplated in 1876, and decided that neither in 1871, nor in 1876, nor in 1906, was the furtherance of political objects contemplated by the Legislature as a lawful object of a trade union; it was therefore *ultra vires*, even though the constitution of the union should sanction it, and the Court would restrain the application of funds thereto by injunction. The main argument for this decision was that the reasoning in *Baroness Wenlock* v. *River Dee Co.*, applied equally to a registered trade union. Speaking of that case, Lord Macnaghten said:

> This principle is not confined to corporations created by special Acts of Parliament. It applies, I think, with equal force in every case where a

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[1] The principal directions in which trade unions seemed likely to expand were (1) towards securing parliamentary representation and financing political movements; and (2) towards embarking on commercial enterprises, such as the publication of newspapers.

[2] 1901, 17 T. L. R. 256.

[3] 1907, 1 K. B. 361.

[4] The main argument was that s. 16 omitted mention of several vital functions of trade unions, *e.g.* the provision of benefits to members.

[5] *Osborne* v. *Amalgamated Society of Railway Servants*, 1909, 1 Ch. 163, at p. 192, *per* Farwell, L.J.; 1910, A. C. 87, at p. 102, *per* Lord Atkinson.

> society formed for purposes recognised and defined by an Act of Parliament places itself under the Act, and by so doing obtains some statutory immunity or privilege.[1]

He added that the powers exercisable must be either expressly conferred or derived by reasonable implication from the provisions of the Acts, and that not all powers which conduce to the performance of the proper objects are so necessary as to be implied.[2]

The *Osborne* judgments [3] left certain points relative to Section 16 undecided. First, it was not settled whether the reasoning in *Osborne's Case* applied equally to an unregistered trade union. The society was registered, and Lords Atkinson and Macnaghten, in particular, based their argument that the principle in *Baroness Wenlock's Case* might be extended, almost entirely on the privileges afforded to trade unions by the system of registration. But other judgments, notably that of Lord Halsbury, took account of the exceptional status of a trade union, registered or unregistered, in matters of tort after 1906, and the limited enforceability after 1871 of trade union agreements which, but for the 1871 Act, would generally have been illegal and void; so that these judgments seem to imply that an unregistered trade union, like a registered trade union, should be restricted in its lawful objects by Section 16.[4] Secondly, it was held in 1912 in *Gaskell's Case*,[5] that the fact that the rules of a trade union made provision for the formation of a Parliamentary representation fund, in the way held illegal in *Osborne's Case*, did not deprive the society of its status as a trade union in law,[6] and that the registration of the society as a trade union would still be good. Yet, in *Osborne's Case*, various

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[1] 1910, A. C. at p. 94; cf. *ibid.* at p. 102, *per* Lord Atkinson.

[2] Lord James alone expressly differed from the majority. He believed that s. 16 was not a clause of definition, and that the Legislature only intended that certain stipulations should be complied with before a society might be recognised as a trade union. Lord Shaw did not actually dissent, but he went so far as to say of trade unions: "Statute did not set them up . . . and I have some hesitation in so construing language of statutory recognition as a definition imposing such hard-and-fast restrictive limits as would cramp the development and energies and destroy the natural movements of the living organism" (1910, A. C. at pp. 107–8).

[3] *Osborne's Case* was followed in *Parr* v. *Lancs. and Cheshire Miners' Federation*, 1913, 1 Ch. 366.

[4] There is a decision of Leigh Clare, V.-C., which applied the doctrine of *ultra vires* to an unregistered trade union (Lancs. Ch. Ct., July 10, 1910), and in a Scottish case (*Wilson* v. *Scottish Typographical Assocn.*, 1912, S. C. 534) it was held that the principle of *Osborne's Case* governed an unregistered trade union, but beyond these there is no authority. The Trade Union Act, 1913, subjects registered and unregistered trade unions to practically identical considerations (see *post*, p. 96).

[5] *Gaskell* v. *Lancs. and Ches. Miners' Federation*, 1912, 28 T. L. R. 518.

[6] It did not lose the protection of the Trade Disputes Act, 1906.

dicta imply that the assumption of objects not expressly or by reasonable implication recognised by the Legislature as proper objects of a trade union, such as political objects and trading enterprise, might have the effect of depriving the society concerned of its privileges and even of its status as a trade union, especially as it would be impossible clearly to distinguish cases in which valid objects, and not illegal objects, were the principal *raison d'être* of the society.[1]

The effect of the Osborne decision recommended itself so little to the Legislature that in 1913 it set about to give statutory recognition to the political objects of trade unions, with such regulations as it deemed necessary. At the same time, it placed the statutory definition of a " trade union " on a new basis. The revised definition is a happy blending of two points of view. It favours neither the sweeping relaxation of the statutory " restriction of powers," nor the retention of the rigid doctrine propounded in *Osborne's Case*, but recognises that statute-law should not lag too far behind the gradually changing popular conception of trade unions, and that trade unions in many ways deserve to enjoy a generous freedom of action and expansion. At the same time it is remembered that societies whose trade union objects are relatively in the background have little claim to enjoy the peculiar status of a trade union.

Section 2 (1) of the Trade Union Act, 1913, enacts that the expression " trade union," for the purpose of the Trade Union Acts, 1871–1906, and the Act of 1913,[2] means any combination, whether temporary or permanent, the principal objects of which are under its constitution statutory objects. Whether or not a combination answers this test under the Act may arise for decision by the courts and also by the Registrar of Friendly Societies.[3] The Registrar may have to apply the test in two connections :

(1) On an application by a combination for registration as a trade union under the Act of 1913. Section 2 (2) of that Act provides that :

> the Registrar of Friendly Societies shall not register any combination as a trade union unless in his opinion, having regard to the constitution of the combination, the principal objects of the combination are statutory objects.

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[1] 1909, 1 Ch. at pp. 185–6, *per* Fletcher Moulton, L.J. ; *ibid.*, at pp. 192–3, *per* Farwell, L.J. ; and at p. 175, *per* Cozens-Hardy, M.R. The *dicta* in *Osborne's Case* are, however, *obiter*. *Gaskell's Case* remains important after 1913, but only in relation to unregistered trade unions, because a union having objects which are *ultra vires* and illegal will, since the Act of 1913, be refused registration by the Registrar of Friendly Societies.

[2] We may now add the Trade Union (Amalgamation) Act, 1917, and the Trades Disputes and Trade Unions Act, 1927. See s. 8 (1) of the latter Act.

[3] S. 7 of the Act of 1913 defines the " Registrar of Friendly Societies."

This provision is important because Section 2 (1) of the Act provides that any combination which is for the time being registered as a trade union shall be deemed to be a trade union as defined by the Act, so long as it continues to be so registered.[1]

(2) On an application by an unregistered trade union for a certificate that it is a trade union as defined by the Act. Section 2 (3) of the Act provides that :

> any unregistered trade union may, if they think fit, at any time without registering the union, apply to the Registrar of Friendly Societies for a certificate that the union is a trade union within the meaning of the Act of 1913, and the Registrar, if satisfied, having regard to the constitution of the union and the mode in which the union is being carried on, that the principal objects of the union are statutory objects, and that the union is actually carried on for those objects, shall grant such certificate.

Section 2 (5) of the Act provides that a certificate of the Registrar that a trade union is a trade union within the meaning of the Act of 1913 shall, so long as it is in force, be conclusive for all purposes.[2]

Sections 2 (2) and (3) do not entirely bar resort to the courts. For by Section 2 (4) it is provided that :

> any person aggrieved by any refusal of the Registrar to register a combination as a trade union, or to give a certificate that an unregistered trade union is a trade union within the meaning of the Act of 1913, or by the withdrawal under s. 2 of a certificate of registration, or of a certificate that an unregistered union is a trade union within the meaning of the Act of 1913, may appeal to the High Court, or in Scotland to the Court of Session, within the time and in the manner and on the conditions directed by rules of court.[3]

Therefore the courts may have to apply the test in two classes of cases : (*a*) in cases under Section 2 (4), where a person aggrieved by the Registrar's decision exercises his right of appeal, and (*b*) in cases where the Court is dealing with an unregistered union which has not obtained a certificate from the Registrar under Section 2 (3).

The Act of 1913 does not purport to repeal the definition contained in Section 16 of the Act of 1876. By Section 1 (2) it provides that :

> for the purposes of the Act of 1913, the expression " statutory objects " means the objects mentioned in s. 16 of the Trade Union Act Amendment

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[1] S. 2 (2) defines the circumstances in which the Registrar may withdraw the certificate of registration.

[2] S. 2 (3) defines the circumstances in which the Registrar may withdraw the certificate that an unregistered trade union is a trade union within the meaning of the Act of 1913.

[3] Statutory Rules and Orders, 1913, 1274/L.27, p. 2269.

> Act, 1876, namely, the regulation of the relations between workmen and masters, or between workmen and workmen, or between masters and masters, or the imposing of restrictive conditions on the conduct of any trade or business, and also the provision of benefits to members.

The requirement of Section 2 (1) of the Act of 1913 that the principal objects of a trade union must be statutory objects is qualified by Section 1 (1), which provides that :

> the fact that a combination has under its constitution objects or powers other than statutory objects within the meaning of Act of 1913 shall not prevent the combination being a trade union for the purposes of the Trade Union Acts, 1871–1906,[1] so long as the combination is a trade union as defined by the Act of 1913.

Section 1 (1) adds that :

> subject to the provisions of the Act of 1913 as to the furtherance of political objects, any such trade union shall have power to apply the funds of the union for any lawful objects or purposes for the time being authorised under its constitution.

In other words, any combination will now be regarded for the purposes of the Trade Union Acts, 1871–1927, as a trade union, if its principal objects, as defined by its constitution, are among those enumerated in Section 1 (2) of the Act of 1913, even though it has also under its constitution objects or powers other than those enumerated. Moreover, the funds of a combination which fulfils these requirements may be applied for any lawful purposes authorised by its constitution, subject only to the provisions of the Act of 1913, relating to the application of funds for the furtherance of certain political objects. The law thus makes no such stipulation as that the funds applied in furtherance of statutory objects shall be a preponderating part of the total funds expended.

The Meaning of "Statutory Objects."—The requirement that the principal objects of a trade union must be statutory objects is intended to preclude from attaining the status of a trade union any association primarily carried on for purposes of trading or otherwise, whose trade union objects are relatively in the background ; and the further provision that a union whose principal objects are statutory objects may pursue other lawful objects which are sanctioned by its constitution,[2] is designed to prevent trade unions from being rigidly confined to certain specified objects, where their members decisively favour some legitimate expansion.

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[1] Since the passing of s. 8 (1) of the Act of 1927, this must be read as the Trade Union Acts, 1871–1927.

[2] Subject, of course, to the particular regulations as to expenditure on political objects.

It may be suggested that the distinction between principal and other objects will not always be easy to apply,[1] for perhaps in some cases all the objects of a trade union might be practically co-ordinate, of equal importance, and entirely separable.[2] There are, however, so many factors, such as the financial basis of an association, which help to indicate the relative importance of the different objects, that this difficulty may not often arise.

It is likely that the courts will be concerned mainly with the issue as to when the principal object of a combination is the imposing of restrictive conditions on a trade or business.[3] It may be argued that since now it is not sufficient, in order that a society may be a trade union, that it has a subsidiary object which imposes restrictive conditions on a trade or business, the Act of 1913 may have narrowed the definition in this respect, and affected the authority of certain earlier cases which put a wide construction on this part of Section 16 of the Act of 1876.[4]

Section 1 (1) of the Act of 1913 speaks of "objects or powers." The term "powers" is not defined but is possibly intended to cover such powers as are ancillary to, and necessary for, the due furtherance of the lawful objects of the union.[5]

"*And also the provision of benefits to members.*"—This clause was inserted among the statutory objects, apparently because *Osborne's Case* had revealed that Section 16 of the Act of 1876 omitted this very important function of a trade union from the definition,[6] and the Legislature was perhaps not content with the explanation of this omission given in that case.[7] It is to be noticed that the words "and also" join this clause and the rest of the section, whereas the word "or" connects the other statutory objects specified. This wording suggests that a society cannot be a trade union for the purposes of the Acts, unless it has as a principal object the provision of benefits to members, in addition to any of the other statutory objects.[8] The

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[1] *Gozney's Case*, 1909, 1 K. B. 901, *per* Fletcher Moulton, L.J., at p. 921.

[2] *Swaine* v. *Wilson*, 24 Q. B. D. 252.

[3] *Performing Rights Society, Ltd.* v. *London Theatre of Varieties, Ltd.*, 38 T. L. R. 184; 1922, 2 K. B. 433; 1924, A. C. 1; cf. 1922, S. C. 165.

[4] *Ibid.* In two of these earlier cases—*Chamberlain's Wharf, Ltd.* v. *Smith*, 1900, 2 Ch. 605, and *British Assocn. of Glass Bottle Manufacturers (Ltd.)* v. *Nettlefold*, 1911, 27 T. L. R. 527—the Court did seek out the principal objects of the societies.

[5] *Nettlefold's Case; Osborne's Case*, 1910, A. C. at p. 96, *per* Lord Macnaghten.

[6] *Ante*, p. 94; *Steele's Case*, 1907, 1 K. B. 361.

[7] 1909, 1 Ch. at p. 191, *per* Farwell, L.J.; 1910, A. C. at p. 102, *per* Lord Atkinson.

[8] *Performing Rights Society* v. *London Theatre of Varieties*, 1922, 2 K. B. 433, *per* Bankes, L.J., at p. 444, who rejected this construction, but admitted that the drafting seemed to be at fault.

more likely construction is that the final clause indicates an additional object which may or may not be combined with any of the other statutory objects. But this, too, raises a difficulty, for by placing the provision of benefits on an equality with the other statutory objects, the section seems to entitle an association, which has as a principal object this alone of the statutory objects, to recognition as a trade union. If such an association had no other important object, it would belittle more than a friendly society. There are, however, two safeguards; this particular statutory object must be a principal object, and by virtue of Section 5 of the Trade Union Act, 1871, the registration of any trade union under the Friendly Societies Acts will be void.[1] It is possible that where a society is for the most part a friendly society, but has some rules which regulate the relations between masters and workmen or between workmen and workmen, it might be allowed to elect whether it should be regarded as a trade union or as a friendly society.[2] In view of the opinion expressed in *Osborne's Case*, that the payment of benefits to members was a legal object, it would have been better to have left the final clause out of the specified statutory objects altogether.[3]

"*Imposing restrictive conditions on any trade or business.*"—It has recently been held that to satisfy the statute the restrictive conditions must be imposed in respect of a trade or business in general, and not particularly in respect of individual members of a trade or business.[4] The Court, in inquiring whether a society imposes restrictive conditions on any trade or business, does not consider whether the restrictions are also in illegal restraint of trade.[5] Litigation on this statutory object usually arises in cases where a company registered under the Companies Act is alleged to be a trade union, for this, if

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[1] Similarly, there are safeguards precluding commercial or banking associations from achieving trade union status by this device, for ss. 357–8 of the Companies Act, 1929, requires that a trading association of more than twenty persons, or a banking association of more than ten persons, shall be registered as a company under that Act, and by virtue of s. 5 of the Trade Union Act, 1871 (if read with s. 382 (7) of the Companies Act, 1929), the registration of a trade union under the Companies Act would be void.

[2] *Swaine* v. *Wilson*, 24 Q. B. D. 252; *Gozney's Case*, 1909, 1 K. B. 901.

[3] The term "workmen" is defined by s. 5 (3) of the Trade Disputes Act, 1906, as "all persons employed in trade or industry, whether or not in the employment of the employer with whom a trade dispute arises." This definition serves for ss. 1–2 of the Act of 1913, since the Act of 1906 is to be construed as one with the other Trade Union Acts (see *post*, p. 145).

[4] *Performing Rights Society* v. *London Theatre of Varieties*, 1924, A. C., at p. 25, *per* Lord Sumner. The import of this ruling is not clear.

[5] *Edinburgh and District Aerated Water Manufacturers' Defence Assoc.* v. *Jenkinson*, 1903, 5 F. (C. of S.) 1159.

proved, would avoid the registration and disentitle the company to sue as a company.[1]

In one case, a company of aerated water manufacturers, formed with the object of protecting the bottles and boxes of its members from being dealt with by persons without lawful authority, was held to be a trade union, because it imposed prohibitions on its members as to the purchase and exchange of bottles with non-members, and provided for the imposition of fines for breach of its rules.[2] On the other hand, in another case, a company was held not to be a trade union, where it had taken over the assets and liabilities of an unincorporated association, which was clearly a trade union, and its memorandum of association stated that its object should be to assist any institution with objects similar to those of the trade union and "not being a trade union," and to do all lawful things conducive to the attainment of the specified objects, provided that it should not impose on its members or support with its funds any regulation which, if it were an object of the company, could make it a trade union.[3]

The statutory definition of a trade union now in force seems to leave the way open for trade unions in future legitimately to expand their activities in many directions.[4] The law, as it stands, stipulates that the principal objects of a trade union must be statutory objects. The statutory objects of regulating the relations between masters and workmen, and between workmen and workmen, are elastic enough to permit a vast development of trade union functions. Expansion in the sphere of finance or commerce would encounter the provisions of the Companies Act and Section 5 of the Trade Union Act, 1871. In such circumstances, no doubt, the device of forming a Company with special objects separate from those of the trade union, though composing largely the same membership, might be resorted to, in

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[1] That a society calls itself a trade union is of no import in such litigation, for the Court will consider the rules and objects as a whole (*Gozney's Case*, 1909, 1 K. B. 901 ; *Chamberlain's Wharf Ltd.* v. *Smith*, 1900, 2 Ch. 605).

[2] *Jenkinson's Case, loc. cit.*

[3] *Aberdeen Master Masons' Incorporation, Ltd.* v. *Smith*, 1908, S. C. 669 ; also *Mineral Water Bottle . . . Socy.* v. *Booth*, 1887, 36 Ch. D. 465 ; *Nettlefold's Case*, 1911, 27 T. L. R. 527 ; *Merrifield Ziegler & Co.* v. *Liverpool Cotton Assoc., Ltd.*, 1911, 105 L. T. 97.

[4] Even at the time of the controversy over the Osborne decision, the practice of some trade unions of supporting with their funds such deserving causes as adult education, unlike that of furthering political objects, went on unquestioned, although it also seems to have been illegal before 1913. But the position is now altered. It is not impossible that trade unions may in due course venture into the sphere of banking on a larger scale, as some American trade unions have done, or undertake new functions towards obtaining greater industrial efficiency, or towards the democratisation of control or ownership—ventures which might involve radical constitutional modifications.

which case the company and the trade union would be separate entities.[1]

(B) Political Objects

The Trade Union Act, 1913, made one reservation in Section 1 (1) which indicated that certain political objects were to be subject to considerations different from those which apply to other objects of trade unions.[2]

The two cases relevant to this topic decided before *Osborne's Case* were *Linaker* v. *Pilcher* and *Steele's Case*.[3] In the former, it was held that nothing in the Acts of 1871 and 1876 precluded a trade union from maintaining or assisting a newspaper, if the constitution of the union sanctioned this.[4] In the latter, it was held that, given the power under its constitution, a trade union might consistently with the Trade Union Acts raise funds with which to maintain and to return to Parliament candidates representing its members. The grounds of decision in these cases were refuted in *Osborne* v. *Amalgamated Society of Railway Servants*.[5] One of the objects of the Society, a registered trade union, was "to secure Parliamentary representation," and its rules authorised the making of annual levies for the purpose of providing for the representation of railwaymen in Parliament. All candidates put forward were bound to sign and accept the "conditions of the Labour Party" and to be subject to its whip.[6] The House of Lords granted a declaration that these particular rules of the society were *ultra vires* and void, and an injunction restraining the society from applying its funds to these illegal purposes.

The decision went mainly on two grounds. First, it was founded on what has been called the principle of "the general restriction of powers,"[7] *i.e.* that the purposes complained of were illegal, because they were not authorised as lawful objects of a registered trade union by the Trade Union Acts, either expressly or by necessary implication. Lord James differed from the majority in asserting that parliamentary

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[1] *Nettlefold's Case*, 1911, 27 T. L. R. 527; *Aberdeen Master Masons' Incorporation, Ltd.* v. *Smith*, 1908, S. C. 669; cf. *dicta* of Farwell, L.J., in *Osborne's Case*, 1909, 1 Ch. at pp. 189–190.

[2] *Ante*, p. 98.

[3] 1901, 17 T. L. R. 256; and 1907, 1 K. B. 361, *ante*, p. 94.

[4] See 1909, 1 Ch. at p. 193, for the comments made by Farwell, L.J.

[5] 1909, 1 Ch. 163; 1910, A. C. 87.

[6] These conditions contained one term in the constitution of the Labour Party that "candidates and members must accept this constitution and agree to abide by the decisions of the parliamentary party in carrying out the aims of this constitution."

[7] See Lord Atkinson's *dicta*, 1910, A. C. at pp. 104–5.

representation which had a direct relation to the interests of labour would not be an unlawful object, but on account of the rigorous conditions of the Labour Party by which representatives bound themselves on all questions, he concluded that here no direct relation existed, so that the political objects of this society were illegal.[1] Secondly, in some judgments, stress was laid on what was shortly termed the "constitutional issue."[2] This issue was raised on account of the nature of the rules of this society, and is not necessarily involved in all litigation relating to the parliamentary representation of trade unions. The judgments in question did not all agree as to the basis for regarding the rules as unconstitutional, and it is not possible to say that any of these opinions alone is good law. It appeared that the dictates of public policy had been flouted, in two ways in particular. The minority of the members of the society had been practically compelled to subscribe to the maintenance of representatives to whom it probably objected.[3] Moreover, the rules of the society and the conditions of the Labour Party destroyed the freedom of the Parliamentary representative and made of him a paid delegate, hindered from exercising his trust towards the public in the public interest.[4] More stress, perhaps, was laid on this second aspect of the unconstitutional character of the rules. This is noteworthy in view of the nature of the provisions of the Act of 1913, which relate almost wholly to the former aspect.[5]

Eventually, the Legislature came to the conclusion that trade unions should not, or could not, be excluded altogether from participation in political action. It set about, therefore, to remove the ground of complaint that the minority of members of a trade union were sometimes, against their will, obliged to subscribe to funds for the furtherance of political purposes with which they were not in sympathy.

The law, as it now stands, is to be found in the Trade Union Act,

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[1] 1910, A. C. at p. 99.

[2] 1909, 1 Ch. 163, *per* Farwell and Fletcher Moulton, L.JJ.; and 1910, A. C. 87, *per* Lord Shaw.

[3] 1909, 1 Ch. at pp. 194–5, *per* Farwell, L.J.

[4] *Ibid.*, at pp. 186–7, *per* Fletcher Moulton, L.J.; 1910, A. C. at pp. 108–111, *per* Lord Shaw.

[5] In *Wilson* v. *Scottish Typographical Assocn.*, 1912, S. C. 534, it was held that the reasoning in *Osborne's Case* as to the statutory definition of a trade union applied equally to an unregistered trade union. And in *Wilson* v. *Amalgamated Society of Engineers*, 1911, 2 Ch. 324, it was held that a registered union was not entitled to apply its funds for the purposes of local and municipal labour representation, any more than of parliamentary labour representation. In this, local infirmary boards were included, but boards of guardians of the poor were for some undisclosed reason excepted.

1913, as amended by the Trade Disputes and Trade Unions Act, 1927, and it applies indifferently to registered and unregistered unions. The statutory restrictions on the furtherance of political objects by trade unions do not apply to all political objects of a trade union. Those to which the Acts apply are defined in Section 3 (3) of the Act of 1913, and political objects of other types will be free from regulation and will be legitimate objects under Section 1 (1) of the Act of 1913, if sanctioned by the constitution and not otherwise illegal.[1]

The statutory restrictions are set out in Section 3 (1) of the Act of 1913.[2] The substance of this provision is that the funds of a trade union shall not be applied, either directly or in conjunction with any other trade union, association, or body, or otherwise indirectly, in furtherance of the political objects specified in Section 3 (3) (without prejudice to the furtherance of any other political objects), unless two conditions have first of all been fulfilled ; (i) the furtherance of those objects must have been approved as an object of the union by a resolution for the time being in force passed on a ballot of the members of the union taken in accordance with the Act[3] for the purpose by a majority of the members voting, and (ii) where such a resolution is in force, certain rules must also be in force. These rules must, whether the union is registered or not, be approved by the Registrar of Friendly Societies, and must provide for the following matters :

(*a*) that any payments in the furtherance of those objects are to be made out of a separate fund (termed in this Act, the political fund of the union) ; and

(*b*) for the exemption in accordance with this Act of any member of the union from any obligation to contribute to such a fund if he gives notice in accordance with this Act that he objects to contribute,[4] and

(*c*) that a member who is exempt from the obligation to contribute to the political fund of the union shall not be excluded from any benefits of the union, or placed in any respect either directly or indirectly under any disability or at any disadvantage as compared with other members of the union (except in relation to the control or management of the political fund) by reason of his being so exempt ; and

(*d*) that contribution to the political fund shall not be made a condition for admission to the union.

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[1] For the terms of s. 3 (3), see *post*, p. 110.

[2] It appears from s. 3 (1) that there is no restriction on the assumption by a trade union of any of the specified objects as such ; the restrictions are imposed only on the application of the funds of a trade union in furtherance of the political objects specified in s. 3 (3). The application of funds may be either direct or indirect (*Bennett's Case*, 1915, 31 T. L. R. 203 ; *Carter's Case*, 1915, 60 S. J. 44 ; *Forster's Case*, 1927, 43 T. L. R. 199).

[3] *Post*, p. 105.

[4] *Post*, p. 106.

The Act in later sections states the principles on which the ballot must be taken, and on which the "statutory rules" must be drawn up.[1] With regard to the latter, the most important of the rules relate to the system of obtaining exemption from the obligation to contribute, and in that respect the Act of 1927 has greatly modified the Act of 1913, so that a remodelling of rules made under Section 3 (1) has, since the passing of the Act of 1927, been necessary.[2]

The Ballot.—Section 3 (1) of the Act of 1913 requires that a resolution should be in force approving the furtherance of the political objects specified in Section 3 (3) as an object of the union, passed on a ballot of the members of the union taken in accordance with this Act for the purpose by a majority of the members voting. By Section 4 (1) of the same Act, it is provided that :

> a ballot for the purposes of this Act should be taken in accordance with rules of the union. These rules of the union, relating to the taking of the ballot, should be approved for the purpose, whether the union is registered or not, by the Registrar of Friendly Societies. The Registrar should not approve any such rules unless he is satisfied :
>
> (*a*) that every member has an equal right, and, if reasonably possible, a fair opportunity of voting ; and
>
> (*b*) that the secrecy of the ballot is properly secured.[3]

Section 3 (5) of the same Act provides that :

> the provisions of the Act as to the application of the funds of a union for political purposes shall apply to a union which is in whole or in part an association or combination of other unions as if the individual members of the component unions were the members of that union and not the unions ; but that nothing in the Act shall prevent any such component union from collecting from any of their members who are not exempt on behalf of the association or combination any contributions to the political fund of the association or combination.

This provision seems to make the association or combination a single unit for the furtherance of political objects at least, so that in a case where an association or combination has been formed, a ballot must be taken of the aggregate membership of the component unions, and the resolution passed by a majority of those voting.

Exemption from contribution.—The effect of the Act of 1913 was that the rules of the union, the approval of which by the Registrar is one of the conditions of the right of a union to apply its funds to

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[1] The Registrar has issued copies of Model Rules which fulfil the requirements of s. 3 (1).

[2] It has been necessary by the Second Schedule of the 1927 Act to repeal the words in s. 3 (1) from "and for the exemption" to "that he objects to contribute."

[3] The Act of 1927 does not affect these provisions.

the furtherance of the political objects specified in Section 3 (3), should make provision for the exemption in accordance with the Act of any member from the obligation to contribute, if he gave proper notice of his objection to contribute. In other words, the Act of 1913 prescribed the procedure that is known as "contracting-out," meaning that a member was liable to contribute to the political fund, unless he gave notice of his objection in the manner required by the Act. On the adoption by the union of a resolution as required by Section 3 (1), notice had to be given to the members informing them that each member had a right to be exempt from contributing to the political fund, and that a form of exemption notice could be obtained in the way prescribed in the Act.[1] A member of a trade union might at any time give notice [2] that he objected to contribute to the political fund. On giving this notice, a member was exempt (so long as his notice was not withdrawn) from contributing to the political fund.[3]

Section 3 (1) required that the rules of the union should provide that any payments in furtherance of any of the political objects specified in Section 3 (3) should be made out of a separate fund, termed the political fund. Section 6 added that effect might be given to the exemption of members either :

(*a*) by a separate levy of contributions to that fund from the members of the union who were not exempt ; or

(*b*) by relieving any members who were exempt from the payment of the whole or any part of any periodical contributions required from the members of the union towards the expenses of the union.

Section 4 of the Trade Disputes and Trade Unions Act, 1927, radically alters the meaning of the term "exemption." The new scheme is, in fact, a reversal of the system introduced by the 1913 Act, so that the liability of a member of a union to contribute to the political fund is now conditional on his "contracting-in" in the manner prescribed. The mode in which Section 4 has been drafted is not conducive to lucid exposition.[4] Section 4 (1) provides that :

> it shall not be lawful to require any member of a trade union to make any contribution to the political fund of a trade union unless he has at some time after the commencement of the Act,[5] and before he is first after the

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[1] S. 5 (1).

[2] In the form set out in the Schedule to the 1913 Act, or in a form to the like effect.

[3] S. 5 (2).

[4] The following provisions of the 1913 Act are repealed : s. 3 (1), from "and for the exemption" to "objects to contribute," ss. 4 (2), 5, 6, and the Schedule to the Act.

[5] July 29, 1927.

31st day of December, 1927, required to make such a contribution, delivered at the head office or some branch office of the trade union, notice in writing [1] of his willingness to contribute to that fund and has not withdrawn that notice in the manner prescribed in this sub-section.

As to such withdrawal, Section 4 (1) provides that :

if at any time a member of a trade union who has delivered a notice of his willingness to contribute to the political fund, gives notice of withdrawal thereof, delivered at the head office or at any branch office of the trade union, he shall be deemed for the purposes of this sub-section to have withdrawn the notice as and from the first day of January next after the delivery of the notice of withdrawal.

Section 4 (1) then provides that :

every member of a trade union who has not delivered such a notice of his willingness to contribute to the political fund, or who, having delivered such a notice, has withdrawn it in the manner prescribed by this section, shall be deemed for the purposes of the Trade Union Act, 1913, to be a member who is exempt from the obligation to contribute to the political fund of the union, and references in that Act to a member who is so exempt shall be construed accordingly.[2]

The Act of 1927 sought to remedy certain alleged abuses in the financial arrangements of the political funds of trade unions, against which the Act of 1913 did not sufficiently guard. Especially was this considered a defect where, as was permitted by Section 6 of the 1913 Act, contributions, political and industrial, were levied together and not separately. Section 6 of the 1913 Act was repealed by the Act of 1927,[3] Section 4 (2) of which enacts that :

all contributions to the political fund of a trade union from members who are liable to contribute to that fund shall be levied and made separately from any contributions to the other funds of the union, and no assets of the union, other than the amount raised by such a separate levy as afore-

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[1] In the form set out in the First Schedule.

[2] The only references to exempted members in the unrepealed parts of the 1913 Act are in s. 3 (1), so that though the meaning of s. 4 (1) of the 1927 Act is clear, it would perhaps have been more systematic to have recast s. 3 (1) of the 1913 Act.

The Act of 1927 came into operation on July 29, 1927, but it was provided by s. 4 (4) that, notwithstanding anything in the Act, until December 31, 1927, members of trade unions could be lawfully required to contribute under the old system, as if the Act of 1927 had not been passed. But as regards contributions for 1928, the effect of the Act was that no contributions could be required from any member who had not after July 29, 1927, and before the date of the first request for contributions made after December 31, 1927, given the requisite notice of his willingness to contribute. (See also s. 4 (1) for manner of withdrawal notice.)

[3] See Schedule II. of the Act of 1927.

said, shall be carried to that fund, and no assets of a union other than those forming part of the political fund shall be directly or indirectly applied or charged in furtherance of any political object to which s. 3 of the Trade Union Act of 1913 applies; and any charge in contravention of this subsection shall be void.[1]

A further safeguard was provided by Section 4 (6) of the 1927 Act; which provides that:

> Section 16 of the Trade Union Act of 1871 (which provides for the transmission to the Registrar of annual returns by registered unions), shall apply to every unregistered trade union, so far as respects the receipts, funds, effects, expenditure, assets, and liabilities of the political fund thereof.

The Nature of the Statutory Restrictions imposed by Section 3 (1) *of the Act of* 1913 *and Section* 4 (3) *of the Act of* 1927.[2]—It has been mentioned that the furtherance of the political objects specified in Section 3 (3) of the Act of 1913, must be approved as an object of the union by a resolution for the time being in force passed on a ballot of the members. Section 3 (4) of the Act of 1913 (which is not affected by the Act of 1927), provides that a resolution under Section 3 approving political objects as an object of the union shall take effect as if it were a rule of the union, and may be rescinded in the same manner and subject to the same provisions as such a rule. Certain rules, approved (whether the union is registered or not) by the Registrar of Friendly Societies, should be in force.[3]

Section 3 (2) of the Act of 1913 relates to allegations of breaches of any of the "statutory rules." It provides that:

> if any member of a trade union alleges that he is aggrieved by a breach of any rule made in pursuance of Section 3 of this Act, he may complain to the Registrar of Friendly Societies, and the Registrar, after giving the complainant and any representative of the union an opportunity of being heard, may, if he considers that such a breach has been committed, make such order for remedying the breach as he thinks just under the circumstances; and any such order of the Registrar shall be binding and conclusive on all parties without appeal and shall not be removable into any court of law or restrainable by injunction, and on being recorded in the county court, may be enforced as if it had been an order of the county court.

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[1] It can hardly be intended that voluntary subscriptions by members or non-members to the political fund should not form part of that fund.

[2] S. 4 (3) provides for the amendment of "statutory rules" which was rendered necessary by the new provisions of the Act of 1927.

[3] *Ante*, p. 104. These "statutory rules" are in a peculiarly favourable position: see s. 4 (2) of the 1913 Act, repealed and recast by s. 4 (5) of the 1927 Act.

In considering Section 3 (2) a distinction should be drawn between a breach of a rule made by a union in pursuance of Section 3 (1) of the Act of 1913 and a breach of Section 3 (1) itself, which imposes certain conditions on the right of a trade union to apply its funds to the political objects named in Section 3 (3) of the same Act. The Court will check any attempt to pass off what is really a breach of a rule as a breach of the statutory provision, which if successful would give the party complaining a good cause of action. Such an attempt was made in *Forster's Case*.[1] The defendant union had satisfied Section 3 (1) of the 1913 Act by having passed a valid resolution by ballot, and by framing and adopting rules with the Registrar's approval, providing for the matters specified in Section 3 (1). The union had a separate political fund. The plaintiff claimed that the union had applied its general funds indirectly to political purposes within Section 3 (3). After the Registrar had refused to make an order under Section 3 (2), the plaintiff went to the Court, claiming that the misapplication alleged was *ultra vires* the union, on the ground that it was a breach of Section 3 (1), *i.e.* a breach of one of the restrictive conditions therein imposed. Eve, J., held that the claim that there had been a breach of Section 3 (1) failed. The union had complied with all the requirements of Section 3 (1), and when all the conditions precedent were fulfilled, the learned Judge believed that the statutory restrictions ceased to provide a ground of action. "It seems to me that from that time forward it was a question of the rules and not of the statute."[2]

Political Objects to which Section 3 (1) of the Act of 1913 applies.—Section 3 (3) of the Act of 1913 defines the political objects to which Section 3 (1) of that Act applies. It provides that :

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[1] *Forster* v. *National Amalgd. Union of Shop Assistants, etc.*, 1927, 43 T. L. R. 199.

[2] 43 T. L. R. 199, at p. 206. Ss. 3 (4) and 4 (2) of the Act of 1913, and now s. 4 (5) of the 1927 Act, seem to substantiate this view.

It is probable that a plaintiff cannot go to the Court even if he relies on a breach of the rules of the union, when once he has tried and failed to obtain an order from the Registrar. This question is not yet settled, but there are strong *obiter dicta* by Eve, J., in *Forster's Case* in favour of the view here stated, even though s. 3 (2) does not say that the Registrar's decision will be final and conclusive and not subject to appeal where it goes against the complainant. Nor is it settled whether on a claim that the rules have been broken, the plaintiff can in the first place elect whether to go to the Registrar or to the Court. S. 3 (2) says : "any member . . . may complain to the Registrar." S. 3 (2) entitles only a "member" of a trade union who is aggrieved to go to the Registrar to complain of alleged breaches of the rules. But one of the rules which s. 3 (1) requires to be made, viz. that contribution to the political fund shall not be made a condition for admission to the union, seems to affect only non-members who are seeking to become members, so that apparently they, on being aggrieved by a breach of this rule, cannot go to the Registrar. It might reasonably be held then that they should be allowed to go to the Court, even though that option were refused to members who had the benefit of s. 3 (2).

The political objects to which s. 3 applies are the expenditure of money:

(*a*) on the payment of any expenses incurred, either directly or indirectly, by a candidate or prospective canditate for election to Parliament or to any public office, before, during or after the election in connection with his candidature or election; or

(*b*) on the holding of any meeting or on the distribution of any literature or documents in support of any such candidate or prospective candidate; or

(*c*) on the maintenance of any person who is a member of Parliament or who holds a public office; or

(*d*) in connection with the registration of electors or the selection of a candidate for Parliament or any public office; or

(*e*) on the holding of political meetings of any kind, or on the distribution of political literature or political documents of any kind, unless the main purpose of the meetings or of the distribution of the literature or documents is the furtherance of statutory objects within the meaning of this Act.

The expression "public office" in this section means the office of member of any county, county borough, district, or parish council, or board of guardians, or of any public body who have power to raise money, either directly or indirectly, by means of a rate.

In one case a trade union which purchased shares in a company formed to publish a newspaper which sought to promote the policy of the Labour Party, in order to assist this political newspaper, and not as an ordinary investment, was held to be furthering a political object within Section 3 (3).[1] But the word "political" has not yet been authoritatively defined. Whether the courts will be as strict in applying the definition of "statutory objects" to the political objects covered by class (*e*) as they were in *Osborne's Case* remains to be seen. It is probable that the meaning of the term "political" will arise frequently for settlement by the Registrar under Section 3 (2) of the Act of 1913.[2]

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[1] *Bennett* v. *National Amalgd. Socy. of Operative House and Ship Painters, etc.*, 1915, 31 T. L. R. 203; *Carter's Case*, 1915, 60 S. J. 44.

[2] *Forster's Case*, 1927, 43 T. L. R. at p. 203. See *dicta* of the Registrar cited, *ibid.*

The meaning of the term "distribution" is not settled. It is not certain whether it includes the cost of preparing, printing and publishing literature or documents, and other steps preparatory to distribution, or only the cost of distribution. Apparently, the Act requires that the literature or documents should have been distributed, and the cost of preparation and printing thereof where they are not intended for circulation, does not seem to be included, even though the preparation or printing are not done with any statutory object in view. But to hold that the Act only applies to the cost of actual circulation would, it seems, deprive the provision of most of its substantial effect.

CHAPTER IV

TRADE UNIONS AND CRIMINAL LAW AFTER 1871

To discover the legal position of acts done in the course of trade disputes before 1871 it was necessary to consider the combined effect of the Combination Act, 1825, and the Molestation of Workmen Act, 1859, and the common law. It may be useful to summarise certain points. In the cases decided before 1871, there were expressed mainly three distinct views of the common law, so far as it affected the criminal liability of persons for acts done in trade disputes, viz. the view expressed by Crompton, J., in *Walsby* v. *Anley*[1]; the doctrine expounded by Sir W. Erle in his Memorandum on the Law relating to Trade Unions in 1868[2]; and the view that a combination formed with an intent to "coerce" any person in the employment of his labour or capital is indictable at common law.[3] It is practically certain that, after 1871, the first of these theories would not have been upheld by the courts.[4] The doctrine maintained by Sir W. Erle has never been definitely discountenanced; the courts have rather taken a wider view of criminal conspiracy, and thereby evaded the difficult question as to whether the law does recognise a specific right to a free course of trade.[5] Traces of the third view appear in subsequent cases, which will be mentioned later.[6]

Since 1871, a trade union, in regard to criminal law at any rate, has not been concerned with the first two doctrines. For by Section 2 of the Trade Union Act, 1871,[7] it was enacted that:

> the purposes of any trade union shall not, by reason merely that they are in restraint of trade, be deemed to be unlawful so as to render any member of such trade union liable to criminal prosecution for conspiracy or otherwise.

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[1] 1861, 122 R. R. 823; 3 E. & E. 516; *ante*, p. 42.

[2] *Ante*, p. 43.

[3] *R.* v. *Druitt*, 1867, 10 Cox, 592; *ante*, p. 45.

[4] *R.* v. *Stainer*, 1870, 11 Cox, 483; *Mogul Case*, 23 Q. B. D., at p. 619, *per* Bowen, L.J., and at p. 627, *per* Fry. L.J. Cf. *ibid.*, 1892, A. C. at p. 39, *per* Lord Halsbury.

[5] *Post*, p. 116.

[6] *Ibid.*

[7] See *ante*, p. 67.

In the same year, the Criminal Law Amendment Act was passed "to amend the criminal law relating to violence, threats, and molestation."[1] This Act did not affect merely the acts of members of trade unions; it was part of the general criminal law, applying to "every person." It repealed, *inter alia*, the Acts of 1825 and 1859, and defined afresh the statutory offences in this connection. Section 1 provided that:

> every person who shall do any one or more of the following acts:
> 1. use violence to any persons or any property; or
> 2. threaten or intimidate any person in such manner as would justify a justice of the peace, on complaint made to him, to bind over the person so threatening or intimidating to keep the peace; or
> 3. molest or obstruct any person in the manner defined by this section;
>
> with a view to coerce such person,
>
> (*a*) being a master to dismiss or to cease to employ any workman, or being a workman to quit any employment or to return work before it is finished;
> (*b*) being a master not to offer or being a workman not to accept any employment or work;
> (*c*) being a master or workman to belong or not to belong to any temporary or permanent association or combination;
> (*d*) being a master or workman to pay any fine or penalty imposed by any temporary or permanent association or combination;
> (*e*) being a master to alter the mode of carrying on his business, or the number or description of any persons employed by him;
>
> shall be liable to imprisonment, with or without hard labour, for a term not exceeding three months.

It was further provided that:

> a person shall for the purposes of this Act, be deemed to molest or obstruct another person in any of the following cases:
> (*a*) if he persistently follow such person about from place to place; or
> (*b*) if he hide any tools, clothes or other property owned or used by such person, or deprive him of or hinder him in the use thereof; or
> (*c*) if he watch or beset the house or other place where such person resides or works, or carries on business, or happens to be, or the approach to such house or place, or if with two or more persons he follow such person in a disorderly manner in or through any street or road.[2]

Certain points should be noticed. The terms "threaten" and "intimidate" were no longer to be left at large to the jury. These offences now involved such acts as would justify a justice of the

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[1] 34 & 35 Vict. c. 32.

[2] Proceedings might have been brought at common law for a conspiracy to commit any of the offences named in s. 1 (see s. 1).

peace in binding over the person threatening or intimidating to keep the peace. In other words, there had to be a threat of violence to person or property.[1] This was a considerable amelioration of the previous law, and a mere threat to strike ceased to be a statutory offence.[2] To constitute an offence within Section 1, any of the acts defined had to be done with an intention to coerce another person to do any of certain specified acts. Illegal picketing was defined, though that term was not used.[3]

Section 1 contained a proviso to the effect that no person should be liable to any punishment for doing or conspiring to do any act, on the ground that such act restrained or tended to restrain the free course of trade, unless such act was one of the acts specified in Section 1, and was done with the intention of coercing as mentioned in that section. This proviso went further than Section 2 of the Trade Union Act, 1871, because its application was not confined to the purposes of a trade union. Section 2 of the Trade Union Act is, however, still in operation, while the proviso to Section 1 of the Criminal Law Amendment Act was repealed in 1875. The proviso struck only at liability incurred by doing or conspiring to do any act which restrained or tended to restrain the free course of trade, and did not, at any rate expressly, remove other grounds of common law liability, if any existed. In *R.* v. *Bunn*,[4] such another ground was discovered. Brett, J., defined "improper molestation" as :

> anything done with an improper intent, which the jury should think was an unjustifiable annoyance and interference with the masters in the conduct of their business, and which in any business would be such annoyance and interference as would be likely to have a deterring effect upon masters of ordinary nerve.[5]

The charge was one of common law conspiracy ; there was no breach of Section 1. Brett, J., held that the Act did not say that the offences defined by Section 1 should be the only offences punishable by the courts, and that the proviso to Section 1 did not affect interference with a person's free will by threats and intimidation, as to which the Act did not contemplate a repeal of the common law. In *R.* v. *Hibbert*, in 1875, Cleasby, B., expressed the following view of coercive watching and besetting :

> Coercion might either be effected by physical force or by operation of fear upon the mind. It is possible that there might be such a molestation

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[1] *Gibson* v. *Lawson*, 1891, 2 Q. B. 545, at p. 559, *per* Lord Coleridge, C.J.

[2] *Wood* v. *Bowron*, 1866, 2 Q. B. 21.

[3] The terms "watch" and "beset" now introduced are not defined, but the places where watching and besetting might be carried on are defined.

[4] 1872, 12 Cox, 316.

[5] *Ibid.*, at pp. 339–340.

> by watching and besetting premises as might be expected to and would operate upon the mind so as to take away liberty of will by giving rise to fear of violence by threats, or to some apprehension of loss or ruin, or to feelings of annoyance. . . . Picketing . . . is not necessarily unlawful; nor is it unlawful to use terms of persuasion towards them (workmen) to accomplish their object; but if the watching and besetting is carried on to such a length and to such an extent that it occasions a dread of loss, it would be unlawful.[1]

These two judgments by their wide interpretation of the expressions "molestation" and "watching or besetting," and the narrow interpretation of the proviso to Section 1, really deprived the Criminal Law Amendment Act of its effect.[2] The charge by Russell Gurney (the Recorder of London) to the Grand Jury in *R.* v. *Hibbert*, is deserving of great respect for its definition of lawful picketing under the Act of 1871, though it differed greatly from the view of Cleasby, B.[3] He stated that watching and besetting under the Act was legal or illegal according to the purposes for which it was carried on. Watching for the purpose of seeing that none who received strike pay were also receiving wages,[4] or for the purpose of informing workmen of the existence of a strike and endeavouring to persuade them to join, was lawful if done peaceably, without anything being done to interfere with the perfect exercise of free will on the part of those who were otherwise willing to work, such as by obstructing and rendering difficult of access the place of business, or by doing anything calculated to produce fear in the minds of ordinary men.[5]

The Royal Commission on the Labour Laws appointed in 1875 was of opinion that a construction of Section 1 of the Act of 1871 was too wide, if it involved that language used to a man for the purpose of persuading him not to work constituted "molestation" of a coercive nature.[6] This Commission was appointed, under presidency of Cockburn, C.J., to make an inquiry into the whole question of the common law crime of conspiracy. It reported that one of the cases in which the crime is committed is where, with a malicious design to do an injury, the purpose of the conspiracy is to effect a wrong, though not such a wrong as when perpetrated by a single individual

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[1] 1875, 13 Cox, 82, at p. 87; cf. *R.* v. *Druitt*, 1867, 10 Cox, 592, *per* Bramwell, B.; *R.* v. *Duffield*, and *R.* v. *Rowland*, 1851, 5 Cox, 404.

[2] The accuracy of these *dicta* has been doubted, in *Gibson* v. *Lawson*, 1891, 2 Q. B. at p. 560, *per* Lord Coleridge, C.J.; see also 21 Q. B. D. at p. 550, *per* Lord Coleridge, C.J., 1892, A. C. at p. 38, *per* Lord Halsbury.

[3] *Parl. Papers*, 1875, Vol. 61, p. 223, ref. No. 273; cited 1899, 1 Ch. at p. 262.

[4] Cf. *R.* v. *Selsby*, 5 Cox, 495, n.; *R.* v. *Bauld*, 13 Cox, 282.

[5] Cf. *R.* v. *Shepherd*, 1869, 11 Cox, 325, which the Recorder cited.

[6] *Second Report*, at p. 520.

would amount to an offence under the criminal law.[1] This is certainly a more limited view of conspiracy than the view that a combination maliciously to injure another is indictable,[2] for the word "wrong" seems to mean nothing less than a tort.[3] The Report recognised the great uncertainty of this section of the law.

The ambiguity of the law led to the passing of the Conspiracy and Protection of Property Act, 1875,[4] which to a large extent, though not entirely, placed the criminal law as to combinations of employers and workmen on a statutory basis. The Act repealed (*inter alia*) the Criminal Law Amendment Act, 1871. The following are the terms of Section 3 :

> An agreement or combination by two or more persons to do or procure to be done any act in contemplation or furtherance of a trade dispute between employers and workmen shall not be indictable as a conspiracy if such act committed by one person would not be punishable as a crime.[5]
>
> Nothing in this section shall exempt from punishment any persons guilty of a conspiracy for which a punishment is awarded by any Act of Parliament.
>
> Nothing in this section shall affect the law relating to riot, unlawful assembly, breach of the peace, or sedition, or any offence against the State or the Sovereign.
>
> A crime for the purposes of this section means an offence punishable on indictment, or an offence which is punishable on summary conviction, and for the commission of which the offender is liable under the statute making the offence punishable to be imprisoned, either absolutely or at the discretion of the Court, as an alternative for some other punishment.[6]

The effect of this section is that strikes and other combinations are not criminal if they are in contemplation or furtherance of a trade dispute unless :

(*a*) the agreement or combination is to do or to procure to be done some act which if done by one person or by persons without combination would constitute a crime as defined by Section 3 ; or

(*b*) such strike or combination involves a conspiracy for which a punishment is awarded by any Act of Parliament ; or

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[1] Cited, *R.* v. *Parnell*, 14 Cox, pp. 513–21.

[2] See *post*, p. 116 ; *Sorrell* v. *Smith*, 1925, A. C. 700.

[3] Cf. *R.* v. *Warburton*, 11 Cox, at p. 587, *per* Cockburn, C.J.

[4] 38 & 39 Vict. c. 86.

[5] S. 5 (3) of the Trade Disputes Act, 1906, repealed the words "between employers and workmen," and defined the expression "trade dispute" ; see *Vacher's Case*, 1913, A. C. at p. 122, *per* Lord Atkinson.

[6] See final paragraph of s. 3.

(*c*) such strike or combination constitutes a breach of the law relating to riot, unlawful assembly, breach of the peace, or sedition, or any offence against the State or the Sovereign.[1]

Section 3 does not apply if the agreement or combination is not to do or procure to be done an act in contemplation or furtherance of a trade dispute. Before the passing of the Trade Disputes Act, 1906, there was the further limitation that Section 3 could not apply unless the trade dispute was one between employers and workmen.[2] At the present time if the strike or combination is not in contemplation or furtherance of a trade dispute, the law as it stood before the Act of 1876, and not Section 3 of that Act, applies.[3] Reference is necessary then to the law of criminal conspiracy as defined in several leading cases. There is no doubt that there may be something in the character of a combination of several persons which may result in a combination to do an act being held to be indictable even though that act if done by an individual may not be criminal. This may be because the concert makes the act unduly "oppressive or dangerous,"[4] or makes the harmful act sufficiently important to justify the Court in treating as a crime what would, if done by one, escape on the plea, *De minimis non curat lex*.[5] In recent cases there has been a tendency to base the distinction between innocent and indictable combinations—always assuming that the combination is not to do an act in itself criminal, but still harmful—on the absence or presence of a *mens rea*, a motive or intention to injure another person rather than to defend or further the interests of the actor.[6] In the leading case of *Sorrell* v. *Smith*,[7] *dicta* of great authority and precision of Lords Cave and Dunedin should be noted. Lord Cave asserted that a combination of two or more wilfully to injure a man in his trade in unlawful, but that if the real purpose is not to injure another, but to forward or defend the trade of those who enter into the combination, then no wrong is committed, *i.e.* there is just cause or excuse for the action taken. It is otherwise, of course, where means *per se* unlawful have

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[1] See *post*, pp. 154–5.

[2] Trade Disputes Act, 1906, s. 5 (3); see *post*, p. 146, for the present meaning of the words "in contemplation or furtherance of a trade dispute."

[3] *Lyons* v. *Wilkins*, 1896, 1 Ch. 811, at p. 834, *per* Smith, L.J.; *Quinn* v. *Leathem*, 1901, A. C. at p. 541, *per* Lord Lindley.

[4] *Mogul Case*, 1889, 23 Q. B. D. at p. 616, *per* Bowen, L.J.

[5] *Ibid.*, 1892, A. C. at p. 45, *per* Lord Bramwell; *Quinn* v. *Leathem*, 1901, A. C. at p. 530, *per* Lord Brampton.

[6] 23 Q. B. D. at pp. 617–18, *per* Bowen, L.J.; *Allen* v. *Flood*, 1898, A. C. at pp. 168–69, *per* Lord Shand; *Quinn* v. *Leathem*, 1901, A. C. at p. 512, *per* Lord Shand.

[7] 1925, A. C. 700.

been employed.[1] This discussion of criminal conspiracy is of less, but still of some, importance, since the passing of the Trade Disputes Act, 1906, Section 5 (3) of which repeals the words "between employers and workmen" in Section 3 of the Act of 1875, and defines the terms "trade dispute" and "workmen."[2]

The remainder of the Act of 1875 is concerned with offences by individuals. Some of these offences involve acts which but for the Act would not be criminal at all, or at most would be actionable. Section 4 makes special provisions to apply to persons employed by local authorities or other public authorities. It enacts that :

> where a person employed by a municipal authority,[3] or by any company or contractor upon whom is imposed by Act of Parliament the duty, or who have otherwise assumed the duty of supplying any city, borough, town or place, or any part thereof, with gas or water, wilfully and maliciously breaks a contract of service with that authority or company or contractor, knowing or having reasonable cause to believe that the probable consequences of his so doing, either alone or in combination with others, will be to deprive the inhabitants of that city, borough, town, place or part, wholly or to a great extent of their supply of gas or water, he shall on conviction thereof by a court of summary jurisdiction or on indictment as hereinafter mentioned,[4] be liable either to pay a penalty not exceeding twenty pounds or to be imprisoned for a term not exceeding three months, with or without hard labour.[5]

The section further requires that :

> every such municipal authority, company or contractor as is mentioned in this section shall cause to be posted up, at the gasworks or waterworks, as the case may be, belonging to such authority or company or contractor, a printed copy of this section in some conspicuous place where the same may be conveniently read by the persons employed, and as often as such copy becomes defaced, obliterated, or destroyed, shall cause it to be renewed with all reasonable despatch. If any municipal authority or company or contractor make default in complying with the provisions of this section in relation to such notices as aforesaid, they or he shall incur on summary conviction a penalty not exceeding five pounds for every day during which such default continues, and every person who unlawfully

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[1] Lord Dunedin's judgment recalls that of Lord Brampton in *Quinn* v. *Leathem*, 1901, A. C. at p. 528. The latter's definition of conspiracy is, however, very ambiguous.

[2] S. 5 (3) is dealt with *post*, p. 145 ; see *Lyons* v. *Wilkins*, 1896, 1 Ch. 811.

[3] The expression "municipal authority" is defined in s. 14 of the Act of 1875.

[4] Ss. 10–12 of the Act of 1875 ; and *post*, p. 133.

[5] S. 8 of the Act of 1875, and s. 4 of the Summary Jurisdiction Act, 1879 (reduction of penalties).

> injures, defaces, or covers up any notice so posted up as aforesaid in pursuance of this Act, shall be liable on summary conviction to a penalty not exceeding forty shillings.[1]

The breach of contract, to be a violation of Section 4, must be committed "maliciously." Section 15 of the Act provides that this word must here be construed in the same manner as it is construed in Section 58 of the Malicious Damage Act, 1861. In the Act of 1861, the word seems to be used in the sense of doing an act, a natural consequence of which will be injury to the person or property of another, where the doer intends such injury or recklessly does not care whether injury results or not.[2] Section 5 of the Act of 1875 enacts that :

> where any person wilfully and maliciously breaks a contract of service or of hiring, knowing or having reasonable cause to believe that the probable consequences of his so doing, either alone or in combination with others, will be to endanger human life, or cause serious bodily injury, or to expose valuable property whether real or personal to destruction or serious injury, he shall on conviction thereof by a court of summary jurisdiction, or on indictment as hereinafter mentioned,[3] be liable to pay a penalty not exceeding twenty pounds, or to be imprisoned for a term not exceeding three months, with or without hard labour.[4]

This section must now be read with Section 6 (4) of the Trade Disputes and Trade Unions Act, 1927, which enacts that :

> there shall be added to section 5 of the Conspiracy and Protection of Property Act, 1875, the following provision, that is to say : "If any person employed by a local or other public authority wilfully breaks a contract of service with that authority, knowing or having reasonable cause to believe that the probable consequence of his so doing, either alone or in combination with others, will be to cause injury or danger or grave inconvenience to the community, he shall be liable, on summary conviction, to a fine not exceeding ten pounds or to imprisonment for a term not exceeding three months.[5]

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[1] Similar special provisions have been made for authorities supplying electricity, by the Electricity (Supply) Act, 1919. S. 31 of this Act provides that s. 4 of the Act of 1875 shall extend to persons employed by a joint electricity authority or by any authorised undertakers in like manner as it applies to persons mentioned in that section, with the substitution of references to electricity for references to gas or water. See also ss. 20 (1) and 5 (1) of the Electricity (Supply) Act, 1926.

[2] *R.* v. *Latimer*, 1886, 17 Q. B. D. at p. 362 ; *R.* v. *Pembliton*, 2 C. C. 119.

[3] Ss. 10–12 of the Act of 1875 ; *post*, p. 133.

[4] S. 8 of the Act of 1875, and s. 4 of the Summary Jurisdiction Act, 1879.

[5] *Ibid.*

Section 7 of the Conspiracy and Protection of Property Act, 1875

Section 7 of the Act of 1875 creates, and prescribes penalties for, a number of offences. These may be committed by individuals, but a combination to commit any of them will be a combination to commit a crime, indictable at common law, and not protected by Section 3 of the Act of 1875.

Section 7 provides that :

> Every person who, with a view to compel any other person to abstain from doing or to do any act which such other person has a legal right to do or abstain from doing, wrongfully and without legal authority—
>
> (1) uses violence to or intimidates such other person or his wife, or children, or injures his property ; or
>
> (2) persistently follows such other person about from place to place ; or
>
> (3) hides any tools, clothes, or other property owned or used by such other person, or deprives him of or hinders him in the use thereof ; or
>
> (4) watches or besets the house or other place where such other person resides, or works, or carries on business, or happens to be, or the approach to such house or place ; or
>
> (5) follows such other person with two or more other persons in a disorderly manner in or through any street or road ;
>
> shall, on conviction thereof by a court of summary jurisdiction, or on indictment as hereinafter mentioned,[1] be liable either to pay a penalty not exceeding twenty pounds, or to be imprisoned for a term not exceeding three months, with or without hard labour.[2]

It is further provided that :

> Attending at or near the house or place where a person resides or works or carries on business or happens to be, or the approach to such house or place, in order merely to obtain or to communicate information shall not be deemed a watching or besetting within the meaning of this section.[3]

The section is only concerned with criminal proceedings and penalties, and has no bearing on civil remedies. Criminal liability under it does not bar a subsequent civil action where the facts reveal a civil wrong.[4] Interim injunctions have in several cases been

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[1] Ss. 10–12 of the Act of 1875.

[2] See s. 8 of the Act of 1875, and s. 4 of the Summary Jurisdiction Act, 1879, as to reduction of penalties.

[3] The terms of s. 7 should be contrasted with those of s. 1 of the Criminal Law Amendment Act, 1871 (which the Act of 1875 repealed), and s. 3 of the Combination Act, 1825.

[4] *Ward, Lock & Co., Ltd.* v. *Operative Printers' Assistants' Socy.*, 1906, 22 T. L. R. 327 ; *Quinn* v. *Leathem*, 1901, A. C. at p. 542.

granted to restrain threatened or continuing breaches of the section, on the ground that a Court of Equity, acting on well-known principles, can grant a quick remedy in a case where a person's property or trade will be drastically interfered with or possibly ruined.[1]

Section 7 is of general application,[2] although the Act of 1875 only arose from the necessity of legislating for trade disputes.

The gist of an offence created by Section 7 does not rest in the doing of any of the acts defined in the five sub-heads ; proof is necessary that the act was done with a view to compel any other person to abstain from doing, or to do, an act which such other person had a legal right to do, or to abstain from doing, and that the act was done wrongfully and without legal authority.[3] The word " view " imports not " motive," but " purpose " or " intention."[4] The use of the expressions " any other person " and " such other person " is ambiguous, but it has been held that they may refer to different persons. The section will then cover, for example, the watching or besetting of a master's premises with a view to compel a workman to refrain from working.[5]

With regard to the word " act," it seems that since the passing of the Summary Jurisdiction Act, 1879, s. 39 (1), it is sufficient that a conviction follows the words of Section 7 without further specifying any particular acts. But it must be clear that a specific act was present to the minds of, and proved before the magistrates.[6] A conviction for following in a disorderly manner, with a view to compel A.B. to abstain from working as a shoe-finisher in the employment of C.D., a shoe manufacturer, at a specified place, has been held to set out adequately a specific " act."[7]

The words " wrongfully and without legal authority " may be regarded as the kernel of the section, and since the section is penal, these words must be inserted in an information or indictment framed

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[1] *Lyons* v. *Wilkins*, 1896, 1 Ch. at p. 826 ; *Walters* v. *Green*, 1899, 2 Ch. 696.

[2] Note the expression " every person." S. 7 has been used to punish a systematic besetting of Irish cattle dealers, and it may be used to punish intimidation in the world of commerce as well as of trade unions (*R.* v. *Bellew and Fitzgerald*, 1889, *Times*, December 20 (Liverpool Assizes)).

[3] *Wilson* v. *Renton*, 1910, S. C. (J.) 32 ; *Stuart* v. *Clarkson*, 22 S. C. (R.) (J.) 5.

[4] *Lyons* v. *Wilkins*, 1899, 1 Ch. at p. 270.

[5] *Ibid.*, at p. 268.

[6] *R.* v. *McKenzie*, 1892, 2 Q. B. 519 ; *Smith* v. *Moody*, 1903, 1 K. B. at p. 62.

[7] *Ex p. Wilkins*, 1895, 64 L. J. (M. C.) 221. An indictment may be good although it omits to state that the informant had a *legal right* to do or abstain from doing the act which he was intended to be compelled to abstain from doing or to do (*R.* v. *Hulme*, 9 Cr. App. R. 77). Still, an indictment will be defective if the act specified is one which the person to be compelled has no legal right to do or to abstain from doing (*Farmer* v. *Wilson*, 1900, 69 L. J. Q. B., at p. 496).

on it.[1] As to the meaning of the words, there appear to be two distinct rulings.[2] On the one hand, it has been laid down that the words do not make it necessary to establish the illegality of the acts alleged by other evidence than that which proves the acts themselves, so long as no justification or excuse for them is reasonably consistent with the facts proved. This view seems to rest on the assumption that any of the acts named in the five sub-heads, if done with the required "view," would constitute an actionable nuisance or other tort at common law, unless justification or excuse appeared.[3] On the other hand, it has been laid down that the words "wrongfully and without legal authority" are of vital importance. This was the view adopted in *Ward, Lock & Co., Ltd.* v. *Operative Printers' Assistants' Socy.*,[4] in which Vaughan-Williams, L.J., explained the general nature of an offence within Section 7 as follows :

> When the Act of 1875 was passed, the employers had a good cause of action for various forms of nuisance. The Legislature, by the Act of 1875, gave in respect of some of these nuisances, as to which there was a civil remedy, a summary remedy by summons before a magistrate for acts done for which previously there was only a civil remedy.[5] And it seems to me that the words in the first clause of the section, "wrongfully and without legal authority," were introduced for the very purpose of limiting the remedy by criminal prosecution to cases so tortious as to give a civil remedy, . . .[6]

Consequently, as Moulton, L.J., added :

> I cannot see that s. 7 affects, or is intended to affect, civil rights or civil remedies. It legalises nothing, and it renders nothing wrongful that was not so before.[7]

According to the latter view, it is the element of civil wrong in the offence which alone prevents the section from applying to numerous classes of acts (involving an intention to coerce) which do not engender the mischief at which the section is directed.[8] In a civil action, since Section 7 makes nothing actionable which was not so before, the

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[1] *Lyons* v. *Wilkins*, 1899, 1 Ch. at p. 266, *per* Lindley, L.J.

[2] See *post*, pp. 124–6, as to the importance of this question.

[3] *Lyons* v. *Wilkins*, *loc. cit.* ; but see dissenting judgment of Vaughan-Williams, L.J., at p. 273 ; *Stuart* v. *Clarkson*, 22 S. C. (R.) (J.) 5.

[4] 1906, 22 T. L. R. 327.

[5] "At least a civil remedy" would seem more correct, for "violence" in the first sub-head was criminal apart from the Act.

[6] 1906, 22 T. L. R. at p. 329.

[7] *Ibid.*, at p. 329. This ruling avoids having to construe the word "compel" in such a way as to hold that it makes an act done with the intention to compel wrongful in itself (the view taken in *Lyons* v. *Wilkins*).

[8] *Ibid.*, at p. 329, *per* Fletcher Moulton, L.J.

Court has to consider whether there is any cause of action in the acts proved alone, apart altogether from the fact that they may possibly be in violation of the section.[1]

The five sub-heads of Section 7, as modified by the Acts of 1906 and 1927, will now be considered.

1. "*Uses violence to or intimidates such other person or his wife or children, or injures his property.*"—Prior to 1927, the meaning of "intimidation"[2] was not clear. In *Judge* v *Bennett*, Stephen, J., said that "intimidation may mean any kind of threat, provided it made the person against whom it was said reasonably afraid." The judgments in this case are short and unsatisfactorily reported, and cannot be reconciled with later decisions.[3] The leading cases before 1927 were *Gibson* v. *Lawson*, and *Curran* v. *Treleaven*.[4] In these cases, it was emphasised that "intimidation" is not a term of art, but a word of common speech and everyday usage, which must be construed in the light of the circumstances of the time.[5] The term was not defined, but it was laid down that in view of the reasons for which the law was altered in 1875, it should certainly not receive a more stringent interpretation than it had carried in Section 1 of the Act of 1871. In the latter case, Coleridge, C.J., rather favoured, though he did not actually accept, the view expressed by Cave, J., in *R.* v. *McKeevit*,[6] that "intimidation" covers only threats of personal violence. In *Curran* v. *Treleaven* it was held that proof of a threat to a master to call out his men, unless he discharged non-unionists in his employ, and of a calling-out in terms which advised the men to act peaceably and avoid violence and immoderate language, and proof that this action caused fear to the employer, did not constitute proof of "intimidation."[7] In a Scottish case,[8] on the other hand, there was held to be a sufficient averment of acts of "intimidation" where the accused persons assembled with a number of other people in a large crowd, and paraded the streets, and neighbourhood of the houses of

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[1] *Fowler* v. *Kibble*, 1922, 1 Ch. 487.

[2] There is not here, as there is in s. 1 of the Criminal Law Amendment Act, 1871, the limitation that the intimidation must be such as would justify a justice of the peace in binding over the person intimidating to keep the peace (see *ante*, p. 112).

[3] 52 J. P. 247; different views have been taken of this case; *e.g.*, in *Gibson* v. *Lawson*, 1891, 2 Q. B. at pp. 550–51, *per* Mathew, J., and in *Agnew* v. *Munro*, 1891, 18 R. (C. of J.) 22.

[4] 1891, 2 Q. B. 547; 1891, 2 Q. B. 553.

[5] 1891, 2 Q. B. at p. 559, per Coleridge, C.J.; cf. *O'Connell* v. *Reg.*, 11 Cl. & F. at p. 235, *per* Tindal, C.J.

[6] Liverpool Assizes, December 16, 1890, unreported.

[7] Similar decisions were arrived at in *Peto* v. *Apperley*, 1891, 35 S. J. 792; and *Haile* v. *Lillingstone*, *ibid.*, 793.

[8] *Stuart* v. *Clarkson*, 22 S. C. (R.) (C. of J.), 5.

certain persons, shouting and kicking at their doors and flourishing sticks, and threatening them with violence if they continued to work.

It is not a condition of liability under Section 7 (1) that the acts alleged should have succeeded in their object of compelling a person to do or to abstain from doing some act, so long as the acts were done "with a view to compel."[1] Before the Act of 1927, at any rate, it was enough if the intimidation or violence was such as might reasonably "induce serious apprehension of violence in the mind of a man of ordinary courage, though it might not be successful in making him afraid."[2] To secure a conviction under Section 7 (1), it was sufficient to prove that the acts of intimidation, etc., were done with the defendant's connivance, without proof that he took an active part in the proceedings.[3] In short, it may be said that before the Act of 1927 the term "intimidation" received a negative construction, and was probably restricted in application to threats of violence which induce serious apprehension in the minds of men of ordinary courage.

Section 7 (1) is now modified by the Trade Disputes and Trade Unions Act, 1927, Section 3 (2) of which contains a new definition of "intimidation."[4] It provides that:

> In this section the expression "intimidation" means to cause in the mind of a person a reasonable apprehension of injury to him or to any member of his family or to any of his dependents, or of violence or damage to any person or property, and the expression "injury" includes injury to a person in respect of his business, occupation, employment or other source of income, and includes any actionable wrong.

The new definition is similar in one respect to the old law, in that it is not necessary that injury, violence or damage should actually be produced, or fear induced.[5]

It is certain that "injury" includes any actionable wrong, done to a person in respect of his business, occupation, employment or other source of income. Thus it might include defamation, if the defamation injured a person in respect of any of these sources of income. This throws the courts back on a consideration of one of the most difficult parts of the law of torts, viz. as to torts committed by employers or workmen in respect of the trade or employment or

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[1] *Agnew* v. *Munro*, 1891, 18 R. (C. of J.) 22. This ruling seems to be applicable to other sub-heads of s. 7 besides the first.

[2] *Ibid.*, *per* Lord Wellwood, 18 R. (J.), at p. 24.

[3] *Young* v. *Peck*, 1912, 29 T. L. R. 31.

[4] S. 3 (3) of the Act of 1927 provides that in s. 7 of the Act of 1875 the expression "intimidate" shall be construed as having the same meaning as in this section of the 1927 Act.

[5] In construing s. 3 (2) the case of *Agnew* v. *Munro*, 1891, 18 R. (J.) 22, should prove instructive.

livelihood of others. The nature of an actionable threat, as distinct from an intimation that an injurious act is to be done, is still uncertain.[1] The construction is especially difficult where an element of conspiracy is present.[2] The expression "includes" may not be, however, a limiting term. In that case the liability of strikers will be very wide, since almost every strike will cause a reasonable apprehension of injury to some person's business, occupation, employment or other sources of income. The word "injures" occurs in Section 7 (1) of the 1871 Act, but there it seems to mean "does violence to." The construction placed on the words "damage to any person or property" will probably depend on the meaning which is attributed to the term "includes." To establish the offence of "intimidation" within Section 7 (1) of the 1875 Act on the basis of the new definition, it will still be necessary to prove that the intimidation was effected "wrongfully and without legal authority" and "with a view to compel any other person to abstain from doing or to do any act which such other person has a legal right to do or abstain from doing." Here again the courts will be called upon to decide between the conflicting opinions as to the precise effect of these words.[3] If the view taken in *Ward, Lock's Case* be adopted, it will be necessary to prove that the intimidation involved acts which were at least civil wrongs, and which were done with the required intention to compel.

2. "*Persistently follows such other person about from place to place.*"—These words are retained from the Criminal Law Amendment Act, 1871, which the Act of 1875 repealed. In *Smith* v. *Thomasson*[4] there was held to be a violation of this provision when a picket waited outside certain works at a time when non-strikers were leaving, and silently followed one of them at a short distance down two streets, but without speaking to him; the picket lived in another direction. Thus, the act of one person may constitute the offence, for it does not refer to intimidation by a crowd.[5]

3. "*Hides any tools, clothes or other property owned or used by such other person, or deprives him of or hinders him in the use thereof.*"—

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[1] *Post*, p. 141; *Allen* v. *Flood*, 1898, A. C. 1.

[2] *Post*, pp. 142 *et seq.* *Sorrell* v. *Smith*, 1925, A. C. 700. See Sir W. Erle's Memorandum on the Law as to Trade Unions, 1868, for an excellent discussion, with illustrations, of civil and criminal wrongs which are likely to be committed by employers and workmen.

[3] *Lyons* v. *Wilkins*, 1896, 1 Ch. 811; *Ward, Lock & Co., Ltd.* v. *Operative Printers' Assistants' Socy.*, 1906, 22 T. L. R. 327 (*ante*, p. 121).

[4] 1890, 16 Cox, 740.

[5] 1890, 16 Cox, 740, at p. 742, *per* Pollock, B. See also *R.* v. *Wall*, 1907, 21 Cox, 407. As to whether s. 2 of the Trade Disputes Act, 1906, applies to s. 7 (2) as well as to s. 7 (4), see *post*, p. 129.

In *Fowler* v. *Kibble*,[1] the defendants had advised and persuaded a person who was in charge of safety lamps in certain mines not to allow some non-union men employed there to have their lamps, and asked and induced other non-union men who had already had lamps to return them, no threats, violence, or intimidation being used. The defendants' object was principally to prevent a stoppage, though they aimed also at inducing the non-union men to join the affiliated unions. It was held that there had been no violation of the third sub-head of Section 7 because the defendants had not acted with a view to compel the plaintiffs to do something which they had a legal right to abstain from doing, such as to join the unions, but had acted for the purpose of carrying out an existing arrangement with the employers, in a quiet and legitimate manner.[2]

4. "*Watches or besets the house or other place where such other person resides, or works, or carries on business, or happens to be, or the approach to such house or place.*"—For the present law as to watching and besetting, or colloquially, picketing, reference must be made to the combined effect of Section 7 (4) of the 1875 Act, Section 2 (1) of the Trade Disputes Act, 1906, and Section 3 of the Trade Disputes and Trade Unions Act, 1927. The law in operation prior to the Act of 1906 was contained in Section 7 (4) and the proviso to Section 7 of the 1875 Act, which must be read together. The latter enacts :

> Attending at or near the house or place where a person resides, or works, or carries on business, or happens to be, or the approach to such house or place, in order merely to obtain or communicate information, shall not be deemed a watching or besetting within the meaning of this section.

The meaning was that if the introductory words of Section 7 were complied with, a "watching or besetting"[3] of any of the places named was an offence, unless it consisted only in attending at or near such places for either of two purposes, viz. to obtain or to communicate information. "Watching or besetting" was not defined, and the proviso merely stated what should not be a "watching or besetting."[4] Prior to 1906 there was a difference of opinion as to the scope of this legalised picketing. One view was that the placing of pickets outside business premises, in order to persuade workmen to

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[1] 1922, 1 Ch. 487 ; "Tools" include a miner's safety lamp.

[2] See Sargant, J.s' judgment, 1922, 1 Ch. 140.

[3] Terms used without limitation, except as to place.

[4] The reason for permitting picketing for these limited purposes has been said to have been to enable strikers to find out whether persons in receipt of strike pay were also working for wages. Cf. *R.* v. *Bauld*, 13 Cox, at p. 284 ; *R.* v. *Selsby*, 1851, 5 Cox, 495, n.

leave work or not to undertake work, was a breach of the statute, and that the "watching or besetting" of a place with this object constituted a common law nuisance, and that it would be no defence to plead that the object was only peaceably to persuade men to leave work.[1] On the other hand, Vaughan-Williams, L.J., in *Lyons* v. *Wilkins*,[2] asserted that picketing, if free from the element of conspiracy, might or might not be an actionable nuisance at common law according to circumstances. The latter view was adhered to in *Ward, Lock's Case*.[3] The facts of this case were similar to those in *Lyons* v. *Wilkins*, except that though there was nothing to show that the pickets tried to persuade workmen, there was proof that the object of posting pickets had been to persuade workmen to join the union and strike by giving proper notices, so as to force the masters to employ only trade unionists. It was held that these acts came within the proviso to Section 7,[4] and also that no common law nuisance was proved. Moulton, L.J., explained the scope of non-criminal picketing as defined by the proviso, in these terms :

> It expressly excepts a sub-class of acts (which otherwise might be held to be within the class specified in sub-section 4) from the operation of the section, *i.e.* it does not attach the additional penal consequences to acts which come within that sub-class. It leaves them exactly as they were before. If they were civil torts, they remain so. If they were previously criminal in their nature, their criminality and its punishment are unaffected by the section.[5]

This decision seems to adopt the second view that picketing, which involved merely the peaceful persuasion of workmen not to work, was not a watching or besetting within Section 7 (4).

The distinction between "attending" and "watching" is not clear. As to the latter, it has been said :

> There is nothing in the statute which defines the duration of the watching. It may be, it seems to me, for a short time. . . . The word "attending" does not necessarily imply any lengthened attendance upon the spot.[6]

Yet it has been said that "watching" involves persistent watch-

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[1] *R.* v. *Bauld*, 1876, 13 Cox, 282 ; *Lyons* v. *Wilkins*, 1899, 1 Ch. 255 ; *Walters* v. *Green*, 1899, 2 Ch. 696 ; *Charnock* v. *Court*, 1899, 2 Ch. 35.

[2] At p. 273, *dissentiente*. Cf. the view of Russell Gurney (*ante*, p. 114) which Lindley, L.J., in *Lyons* v. *Wilkins* (*ibid.* at p. 268), refused to adopt.

[3] *Ward, Lock & Co., Ltd.* v. *Printers' Assistants' Socy.*, 1906, 22 T. L. R. 327.

[4] Cf. Vaughan-Williams, L.J.s' judgment in *Lyons* v. *Wilkins*, which ruled that the persuasion in that case took the form "merely" of a communication of information covered by the proviso of s. 7.

[5] 1906, 22 T. L. R. 327, at p. 329.

[6] *Charnock* v. *Court*, 1899, 2 Ch. 35, at pp. 38–9.

ing, whereas "attending" indicates a shorter duration and is of a more temporary character.[1]

The words "place where a person happens to be" seems to embrace any place where he is found, however casually.[2] It is not essential for purposes of Section 7 (4) that the persons watched or beset should be in the service or employment of another person, and it may be surmised that this applies to all the sub-sections.[3]

The law as to picketing was amended by the Trade Disputes Act, 1906. In view of the decision in *Ward, Lock's Case*, the change effected does not seem to have been so important as a comparison of the amended and amending clauses would suggest. Section 2 (1) of the Act of 1906 provides :

> It shall be lawful for one or more persons, acting on their own behalf or on behalf of a trade union or of an individual employer or firm in contemplation or furtherance of a trade dispute, to attend at or near a house or place where a person resides or works or carries on business or happens to be, if they so attend merely for the purpose of peacefully obtaining or communicating information, or of peacefully persuading any person to work or abstain from working.

Section 2 (2) provides that :

> Section seven of the Conspiracy and Protection of Property Act, 1875, is hereby repealed from "attending at or near" to the end of the section.

Section 2 (1) marks in some respects a relaxation of the law contained in Section 7 of the 1875 Act ; in other respects it is more stringent. The acts set out in Section 2 (1) are lawful only if done in contemplation or furtherance of a trade dispute, whereas Section 7 imposed no such reservation on the operation of the proviso. It may be assumed at the present time that these acts, if not done in contemplation or furtherance of a trade dispute, cannot claim the protection of Section 2 (1), or even of the proviso to Section 7, for that is repealed.[4] Section 2 (1) renders lawful the attending at or near any of the places named, not only if the object is to obtain or communicate information, but also if the object is to persuade any person to work or to abstain from working. In each case, the object must be to do any of these acts peacefully.[5] S. 2 (1) omits the words

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[1] *R.* v. *Wall*, 21 Cox, at p. 403 ; *M'Cusker* v. *Smith*, 1918, 2 I. R. 432.

[2] 1899, 2 Ch. 35, at p. 39 ; *Walters* v. *Green*, *ibid.*, p. 696.

[3] *Farmer* v. *Wilson*, 1900, 69 L. J. Q. B. 496.

[4] For the meaning of " in contemplation or furtherance of a trade dispute," see *post*, p. 146.

[5] "Peacefully" would probably have been implied in the proviso to s. 7. Cf. s. 2 (1) with the Molestation of Workmen Act, 1859 ; that Act related only to combinations over wages and hours.

" or the approach to such house or place," which appear in Section 7. *Ward, Lock's Case* [1] appears to have held that the proviso to Section 7 merely exempted certain acts from the penal consequences attaching to a breach of Section 7 (4), leaving those acts actionable or even criminal, if actionable or criminal on any ground apart from Section 7.[2] Section 2 (1) of the Act of 1906 makes an alteration by declaring that the acts to which it refers shall be lawful, thus removing civil as well as criminal liability.[3] Consequently, it seems that Section 2 (1) may, in a proper case, be a good defence to an indictment or information under Section 7, to a suit for an injunction in a court of equity, or to a suit for damages for nuisance.

Section 2 (1) has been discussed in later cases. In *R.* v. *Wall* there was held to be a breach of Section 7 (4), where pickets had persistently watched and walked up and down before an employer's works and his private residence, and followed him through the streets to his house ; there was a breach of Section 7 (4) because the watching of the private house was not done with any of the objects named in Section 2 (1), since no persons were present to be persuaded, or to whom information could be imparted, or from whom it could be obtained.[4] " Attending at or near a place " does not include attending " on." [5] It has been said :

> Watching and besetting plainly means an external operation—something not within a house or place, but without it. . . . (s. 2) was never intended to authorise as a matter of right an invasion into a man's house, or entry against the will of the owner into a place or business. . . .[6]

In other words, in construing Section 2 (1) it must be remembered that the interference with private rights which the law has discovered in picketing, and which statute law has partially excused, sounds in nuisance and not in trespass. The extent to which Section 2 (1) makes picketing lawful is really small. It is difficult to see in what way peaceful attending was illegal at common law, unless it were for nuisance.[7]

Full effect must be given to the word " merely." [8] Thus, to persuade the public to refrain from attending a theatre is not equivalent

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[1] 1906, 22 T. L. R. 327.

[2] But cf. *Gibson* v. *Lawson*, 1891, 2 Q. B. at pp. 558–560, *per* Lord Coleridge, C.J.

[3] *Vacher's Case*, 1913, A. C. at p. 123, *per* Lord Atkinson.

[4] *R.* v. *Wall*, 1907, 21 Cox, 401.

[5] *Larkin* v. *Belfast Harbour Commissioners*, 1908, 2 I. R. 214.

[6] *Ibid.*, at p. 220, *per* Lord O'Brien, C.J.

[7] *Larkin's Case*, 1908, 2 I. R. at p. 225 ; see also *M'Cusker* v. *Smith*, 1918, 2 I. R. 432.

[8] *R.* v. *Wall, ante ; Wilson* v. *Renton*, 1910, S. C. (J.) 32.

to persuading persons "to work or abstain from working."[1] Again, to attend at or near a place in pursuance of a controversy of a political or personal nature is not to attend merely for the purposes named in Section 2 (1).[2] Section 2 (1) does not alter in any way the allegations which must be made in a charge under Section 7 of the 1875 Act. The prosecutor need not make an express charge of intimidation, for intimidation is not a factor in the offence created by Section 7 (4).[3] There is some support for the view that Section 2 (1) may be a good defence not only to a charge under Section 7 (4), but also to a charge of persistent following within Section 7 (2).[4] On the other hand, if Section 7 is read as though Section 2 (1) was embodied in it, Section 2 (1) taking the place of the repealed proviso, then since the proviso was but placing a limitation on the criminality of watching and besetting, Section 2 (1) can only be regarded as a defence to a charge under Section 7 (4).[5]

In the Emergency Regulations made under Section 2 of the Emergency Powers Act, 1920, there is a proviso to the effect that no regulations made in accordance with that Act shall make it an offence for any person or persons to take part in a strike, or peacefully to persuade any other person or persons to take part in a strike.

The meaning of "watching or besetting" for the purposes of Section 7 of the 1875 Act was again modified by Section 3 of the Trade Disputes and Trade Unions Act, 1927, and a new offence involving watching or besetting was created. It appears that a modification of the law was decided upon by reason of complaints that the law was not sufficient for the punishment of many acts committed during trade disputes which merited punishment. Most of the acts alleged may be said to exceed merely peaceful persuasion, and so, in view of the terms of Section 2 (1) of the Act of 1906, such complaints are difficult to understand. They recall similar unjustified complaints at the time of the passing of the Combination Act of 1825 and of some of the special combination laws of the eighteenth century.

Section 3 (1) of the 1927 Act enacts:

> It is hereby declared that it is unlawful for one or more persons (whether acting on their own behalf or on behalf of a trade union or of an individual employer or firm, and notwithstanding that they may be acting in contemplation or furtherance of a trade dispute) to attend at or near a house

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[1] *Topin* v. *Feron*, 1909, 43 I. L. T. R. 190.

[2] *M'Cusker* v. *Smith*, 1918, 2 I. R. 432, *per* Campbell, C.J., at p. 440, *per* Kenny, J., at p. 441 (Gibson, J., dissenting).

[3] *Wilson* v. *Renton*, 1910, S. C. (J.) 32.

[4] *Ibid.*

[5] *Larkin's Case, loc. cit.* But it is difficult to see how persistent following can be regarded as nothing more than "attending at or near."

> or place where a person resides or works or carries on business or happens to be, for the purpose of obtaining or communicating information or of persuading or inducing any person to work or to abstain from working, if they so attend in such numbers or otherwise in such manner as to be calculated to intimidate any person in that house or place, or to obstruct the approach thereto or egress therefrom, or to lead to a breach of the peace; and attending at or near any house or place in such numbers or in such manner as is by this sub-section declared to be unlawful shall be deemed to be a watching or besetting of that house or place within the meaning of section seven of the Conspiracy and Protection of Property Act, 1875.

This sub-section must be read with Section 2 (1) of the Act of 1906. Attending at or near any house or place of the nature described, in contemplation or furtherance of a trade dispute, for the purpose of obtaining or communicating information or persuading other persons to work or abstain from working, will, if done peacefully, be neither criminal nor actionable, by reason of Section 2 (1) of the 1906 Act; but now, by reason of Section 3 (1) of the 1927 Act, such attending for any of those specified objects, even if done in contemplation or furtherance of a trade dispute, will be deemed to be a watching or besetting of the house or place within the meaning of Section 7 of the 1875 Act, if those attending do so in such numbers or in such manner as to be calculated (*a*) to intimidate any person in such house or place, or (*b*) to obstruct the approach thereto or egress therefrom, or (*c*) to lead to a breach of the peace.[1]

Section 3 (2) of the 1927 Act defines the expression "to intimidate" for the purposes of that section and of Section 7 of the Act of 1875. It greatly extends the meaning of the term, and when applied to Section 3 (1), it renders criminal many acts by pickets which hitherto do not seem to have been statutory offences.

Attending at or near a house or place in a way calculated to obstruct the approach thereto probably amounts to an actionable nuisance at common law, if done for the purpose of obstruction.[2] But if done peacefully for the purpose of obtaining or communicating information or persuading other persons to work or to abstain from working, it was not a statutory offence before 1927, and was probably rendered lawful by Section 2 (1) of the 1906 Act.[3] The expression "calcu-

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[1] The word "calculated" is vague. The word occurs also in s. 1 (1) of the 1927 Act, and it may be useful to refer to s. 8 (2) (*c*) of that Act, which provides that a strike or lock-out shall not be deemed to be calculated to coerce the Government unless such coercion ought reasonably to be expected as a consequence thereof. It is not necessary, apparently, that any person should actually have been intimidated, or any obstruction caused, or any breach of the peace produced.

[2] Sir W. Erle's *Memorandum*, 1868, p. 83.

[3] *Larkin's Case*, 1908, 2 I. R. 214, at p. 224.

lated to lead to a breach of the peace" does not seem to involve any substantial innovation.

The drafting of Section 3 (1) is somewhat ambiguous. It provides that any of the acts which it declares unlawful shall be deemed to be a watching or besetting within the meaning of Section 7 of the 1875 Act. But the act of watching or besetting is not in itself an offence under Section 7. It is only an offence if the introductory words of Section 7 are complied with. Whatever view be taken of these words,[1] it will always be possible to establish that a watching or besetting within Section 3 (1) of the 1927 Act is done "wrongfully and without legal authority," because Section 3 (1) declares such a watching or besetting to be unlawful. But to secure a conviction under Section 7 of the 1875 Act for any act declared unlawful by Section 3 (1) of the 1927 Act, it would seem to be necessary to prove that the act was done with a view to compel any person to abstain from doing or to do some act which he had a legal right to do or to abstain from doing. This may prove to exclude from liability under Section 7 many acts which are rendered unlawful as a watching or besetting by Section 3 (1) of the Act of 1927.

Section 3 (4) of the Act of 1927 creates a new statutory offence, involving the watching or besetting of residences. It enacts that :

> notwithstanding anything in any Act, it shall not be lawful for one or more persons, for the purpose of inducing any person to work or to abstain from working, to watch or beset a house or place where a person resides or the approach to such a house or place, and any person who acts in contravention of this sub-section shall be liable on summary conviction to a fine not exceeding twenty pounds or to imprisonment for a term not exceeding three months.

This amounts to a special limitation on Section 2 (1) of the 1906 Act. The offence is constituted by the watching or besetting of a house or place where a person resides, or the approach to such a house or place, for the purpose specified in Section 3 (4).[2]

Persons who engage in picketing in strikes or lock-outs which

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[1] *Ante*, pp. 120–1 ; *Lyons* v. *Wilkins*, 1899, 1 Ch. 255 ; *Ward, Lock's Case*, 1906, 22 T. L. R. 327.

[2] The use of the terms "watching or besetting" is unfortunate. The courts have never defined them, but have rather defined what is not watching or besetting ; while the Legislature has provided no comprehensive definition. The exact difference between "watching or besetting" and "attending at or near" is still unsettled. In one opinion, length of time was considered a material factor in the difference, while in another this was denied. Since the offence created by this sub-section is distinct from the offences created by s. 7 of the 1875 Act, the introductory words of s. 7 do not seem to have any reference to it. It seems that the person whose residence is watched or beset need not be the person whom it is intended to induce.

are declared illegal by the Act of 1927, Section 1, are in a special position. Section 1 (4) of that Act provides that :

> the provisions of the Trade Disputes Act, 1906, shall not, nor shall the second proviso to sub-section (1) of s. 2 of the Emergency Powers Act, 1920,[1] apply to any act done in contemplation or furtherance of a strike or lock-out which is by this Act declared to be illegal, and any such act shall not be deemed for the purpose of any enactment to be done in contemplation or furtherance of a trade dispute.

Thus the protection afforded by Section 2 of the Act of 1906 is withdrawn, and it seems that pickets, acting in such illegal strikes or lock-outs, will be subject alone to Section 7 of the Act of 1875, and Section 3 of the Act of 1927.[2] It is likely that pickets will sometimes be guilty of violating Section 1 (2) of the Act of 1927, which provides that :

> if any person declares, instigates, incites others to take part in or otherwise acts in furtherance of a strike or lock-out, declared by this Act to be illegal, he shall be liable on summary conviction to a fine not exceeding ten pounds or to imprisonment for a term not exceeding three months, or on conviction on indictment to imprisonment for a term not exceeding two years.[3]

5. "*Follows such other person with two or more other persons in a disorderly manner in or through any street or road.*"—It seems that such "following" need not be persistent, but the person following must be accompanied by at least two other persons. A person is guilty of this offence who does no more than join a disorderly crowd and follow with it, even though he does not join in its demonstrations ; but a person will not be guilty who joins such a crowd accidentally or for some legitimate purpose, such as trying to induce others to desist.[4]

Section 7 of the Act of 1875 must be read with Section 16 of the same Act. Section 16 provides that nothing in the Act shall apply to seamen or to apprentices to sea service. This means that nothing in the Act shall make seamen or apprentices to sea service guilty of and responsible for the offences set out in the Act ; it does not mean that those offences may be committed upon seamen without any violation of the Act.[5] "Seamen" does not signify "any seafaring

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[1] The proviso to s. 2 of the Emergency Powers Act, 1920, has already been cited, *ante*, p. 129.

[2] The proviso to s. 7 may also apply, because s. 2 of the 1906 Act which repealed it will not be operative.

[3] *Post*, p. 165.

[4] *M'Kinlay* v. *Hart*, 1897, 25 R. (J.) 7 ; *Stuart* v. *Clarkson*, 1894, 22 S. C. (R.) (J.) 5, *per* Lord Young, at p. 8.

[5] *Kennedy* v. *Cowie*, 1891, 1 Q. B. 771, at p. 773, *per* Day, J.

men," but bears the meaning attached to it in the Merchant Shipping Act, 1894.[1] Apparently seamen were exempted from the application of the Act of 1875 because they were already provided for by special legislation giving another and sufficient remedy for offences very similar to those set out in that Act.[2]

Section 9 of the 1875 Act provides that :

> where a person is accused before a court of summary jurisdiction of any offence made punishable by this Act, and for which a penalty amounting to twenty pounds or imprisonment is imposed, the accused may, on appearing before that court, declare that he objects to be tried for such offence by a court of summary jurisdiction, and thereupon the court of summary jurisdiction may deal with the case in all respects as if the accused were charged with an indictable offence and not with an offence punishable on summary conviction, and the offence may be prosecuted on indictment accordingly.

Section 9 gives to a person accused of any such offence a right to have the case dealt with as if he were charged with an indictable offence and to have the offence prosecuted accordingly, and the word " may " in the expressions " may deal " and " may be prosecuted " is an enabling word, empowering the court of summary jurisdiction to give effect to that right, and the Court is bound to give effect to it, if required to do so.[3]

In the case of *Luby* v. *Warwickshire Miners' Association* [4] an ingenious attempt to establish that a trade union having branches and employing delegates was a criminal association by statute was frustrated. The statutes pleaded were the Unlawful Societies Act, 1799, and the Seditious Meetings Act, 1817. It was held that though the statutes were not obsolete and would work very little injustice even now, they could not apply, since trade unions have been exonerated from their provisions by the Legislature, not expressly, but impliedly, by the manner in which Parliament and the courts have dealt with them.[5]

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[1] Re-enacting s. 1 of the Merchant Shipping Act, 1853.

[2] *Reg.* v. *Lynch and Jones*, 1898, 1 Q. B. 61, at p. 65 ; see Sections 225 and 236 of the Act of 1894.

[3] *R.* v. *Mitchell*, 1913, 1 K. B. 561, *per* Lord Coleridge, J., and Bankes, J., Ridley, J., dissenting. Omission to inform the defendant that he has this right will invalidate the subsequent summary proceedings (*R.* v. *Cockshott*, 1898, 1 Q. B. 582).

[4] 1912, 2 Ch. 371.

[5] These statutes were enforced against trade unions as late as 1834, in *Reg.* v. *Dixon*, 6 C. & P. 601 ; and *R.* v. *Ball*, 6 C. & P. 563 ; see also *Parr* v. *Lancs. and Ches. Miners' Federation*, 1913, 1 Ch. 366.

CHAPTER V

TRADE UNIONS AND THE LAW OF TORTS

Sections 1, 3 and 4 of the Trade Disputes Act, 1906, grant certain immunities from liability to civil proceedings to trade unions and persons acting in trade disputes. These sections render it necessary, in the first place, to consider those parts of the law of torts which affected trade disputes prior to that enactment.

The branch of the law of torts with which trade union law is particularly concerned is that which relates to interferences with the trade or calling of others. The practices of trade unions are normally such as frequently cause injury to masters or workmen, by interfering with the perfectly free exercise of their trade or calling. English law since very early times has recognised that the liberty of the individual to carry on his trade or business or to employ his labour as he thinks fit is deserving of protection, and indeed, that this is an important part of the liberty of the subject.[1]

Until late in the last century there was a danger that this recognition of the liberty of the trader would find embodiment in a specific right of action for interfering with a person in his trade or livelihood.[2] But it is almost impossible, after the majority judgments of the House of Lords in *Allen* v. *Flood*, to retain this view.[3] Of course, injurious interferences with trade or labour are very prevalent forms of interference with the individual, and damage caused thereby is easy to prove. Nevertheless, trade and employment, and competition therein, are not regarded with any special favour by the law, nor are interferences with them dealt with by exceptional remedies. Such interference will be illegal if it involves any kind of wrong, civil or criminal, but it is not in its own nature a species of tort. This view must

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[1] *R.* v. *Druitt*, 10 Cox, at pp. 600–1, *per* Bramwell, B.; *Hilton* v. *Eckersley*, 1856, 6 E. & B. at p. 74, 106 R. R. at p. 522.

[2] *Carrington* v. *Taylor*, 11 East, 571; *Tarleton* v. *M'Gawley*, 1 Peake, N. P. C. 270; cf. *Keeble* v. *Hickeringill*, 1707, 11 East, 574 n., *dicta* of Holt, C.J.

[3] 1898, A. C. at pp. 132–134, and at p. 179; see also *Mogul Case*, 23 Q. B. D. at p. 614, and at p. 626.

inevitably prevail because the liberty of the trader and the workman is not absolute. The right to a free course of trade is matter of common right, and the law must define when interference in the trade of another ceases to be a proper exercise of one's own right, and becomes an illegal infringement of the right of another.

A trader, whether in goods or labour, may be guilty of an illegal infringement of the rights of another trader not only by acts committed directly against him, but also by acts which immediately affect a third person and only mediately have an injurious effect on the person wronged. As Lord Lindley said in *Quinn* v. *Leathem*:

> If the interference is wrongful and is intended to damage a third person, and he is damaged in fact,—in other words, if he is wrongfully and intentionally struck at through others, and is thereby damnified,—the whole aspect of the case is changed; the wrong done to others reaches him, his rights are infringed although indirectly, and damage to him is not remote or unforeseen, but is the direct consequence of what has been done. Our law, as I understand it, is not so defective as to refuse him a remedy by an action under such circumstances.[1]

Two categories of cases may be separately considered:

(*a*) Where A. does some act which induces or procures B. to commit some act which will give C. a good cause of action against B. In what circumstances will C. have a right of action against A.?

(*b*) Where the act which B. is induced or procured by A.'s act to do to the injury of C. is not in itself actionable against B., though it causes material damage to C. Under what circumstances will C. have a good cause of action against A.?

For the present, only cases involving acts by individuals without combination will be considered.[2] The main principle governing the two categories is now well settled:

> There are . . . two grounds only upon which a person who procures the act of another can be made legally responsible for its consequences. In the first place, he will incur liability if he knowingly and for his own ends induces that other person to commit an actionable wrong. In the second place, when the act induced is within the right of the immediate actor, and is therefore not wrongful in so far as he is concerned, it may yet be to the detriment of a third party; and in that case . . . the inducer may be held liable if he can be shown to have procured his object by the use of illegal means directed against that third party.[3]

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[1] 1901, A. C. 495, at p. 535.

[2] As to the effect of conspiracy, see *post*, pp. 141–4.

[3] *Allen* v. *Flood*, 1898, A. C. 1, at p. 96, *per* Lord Watson.

Procuring a Breach of Contract

The application of the main principle to the first class of cases was not immediately attained because malice was for some time considered to be an element in the tort. Most of the decisions are concerned with the procurement of a breach of contract. The civil wrong of procuring a breach of contract was not clearly recognised and defined until the case of *South Wales Miners' Federation* v. *Glamorgan Coal Co.*, in 1905.[1] As early as 1853, in the case of *Lumley* v. *Gye*,[2] the majority of the Court had held that to procure a singer, who was under contract to sing only at a certain theatre, to break that contract, was an actionable wrong if damage ensued ; but the principle on which the wrong was founded was not properly defined.[3]

Several points were finally cleared up by the House of Lords in *Quinn* v. *Leathem*[4] and the *Glamorgan Coal Co. Case*,[5] and the tort was defined in very precise terms. Lord Macnaghten, in the former case, said :

> I have no hesitation in saying that I think the decision (*Lumley* v. *Gye*) was right, not on the ground of malicious intention,—that was not, I think, the gist of the action,—but on the ground that a violation of a legal right committed knowingly is a cause of action, and that it is a violation of a legal right to interfere with contractual relations recognised by law if there be no sufficient justification for the interference.[6]

Lord Lindley said :

> The principle which underlies the decision (*Lumley* v. *Gye*) reaches all wrongful acts done intentionally to damage a particular individual and actually damaging him.[7]

Knowingly to procure a breach of contract is, then, *primâ facie* actionable, if damage results, but the act of procuring may sometimes be "justified in law," in which case it will not be actionable. Justification in law has not, and indeed cannot, be completely defined,[8] but certain circumstances have been held to constitute justification. Thus,

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[1] 1905, A. C. 239.

[2] 2 E. & B. 216.

[3] See, however, *dicta* of Erle, J., at p. 232, *ibid.*

[4] 1901, A. C. 495.

[5] Malice was considered to be an essential element in the cause of action, in *Bowen* v. *Hall*, 1881, 6 Q. B. D. 333 ; and *Temperton* v. *Russell*, 1893, 1 Q. B. 715. Certain *dicta* in *Allen* v. *Flood* seem to question whether there is a specific tort of this kind at all ; but see *dicta* of Lord Watson, *ibid.*, 1898, A. C. at p. 96. Conspiracy is not an element in this tort.

[6] 1901, A. C., at p. 510.

[7] *Ibid.*, at p. 535.

[8] It must be left to the Court to decide on which side of the line the case falls.

the relation between doctor and patient, father and child, or solicitor and client may, it seems, sometimes justify, as where a father advises and persuades his daughter to break an engagement to marry a man whom he knows to be of criminal character. There may be other justifiable procurements under a great moral sense of right.[1] The following dictum affords valuable guidance :

> I think their sufficient justification for interference with plaintiff's right must be an equal or superior right in themselves, and that no one can legally excuse himself to a man, of whose contract he has procured the breach, on the ground that he acted on a wrong understanding of his own rights, or without malice, or *bonâ fide*, or in the best interests of himself, nor even that he acted as an altruist, seeking only the good of another and careless of his own advantage.[2]

In *Read's Case*,[3] an employer who had contracted to take the plaintiff as apprentice, in breach of one of the defendant society's rules which he had agreed to observe, was induced to break the contract of apprenticeship by a threat by the society to call out their members who were in his service.[4] It was held that the agreement by which the employer had assumed an obligation not to make such a contract with the plaintiff was no justification, although the society believed honestly that it was acting in its own best interests. The breach by B. of his contract with A. cannot be held to justify A. in procuring C. to break an independent contract with B.[5] In *Brimelow* v. *Casson*,[6] it was held that the defendants were justified in procuring certain theatre proprietors to break their contracts with the plaintiff, as they owed a duty to their calling, and even to the public, to take all necessary steps to compel the plaintiff to pay his chorus girls a living wage, so that they should not be driven to supplement their earnings by immoral conduct.

Damage to the plaintiff is the gist of the action, but proof of special damage need not be given.[7] The damages are damages at large.[8] It is no valid objection to this cause of action that the breach

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[1] *Glamorgan Coal Co. Case*, 1903, 2 K. B. (C. A.) at p. 577 ; *Pratt* v. *B. M. A.*, 1919, 1 K. B. at p. 265.

[2] *Read* v. *Friendly Socy. of Operative Stone-Masons*, 1902, 2 K. B. at p. 96 ; *Glamorgan Coal Co. Case*, 1903, 2 K. B. 545, 1905, A. C. 239 ; *Larkin* v. *Long*, 1915, A. C. 814.

[3] 1902, 2 K. B. 96.

[4] There must be actual procurement, *Davies* v. *Thomas*, 1920, 1 Ch. at p. 227.

[5] *Smithies* v. *National Assn. of Operative Plasterers*, 1909, 1 K. B. 310. Cf. *Denaby . . . Collieries Co.* v. *Yorks. Miners' Assn.*, 1906, A. C. 384.

[6] 1924, 1 Ch. 302.

[7] *National Phonograph Co.* v. *Edison Bell, etc.*, 1908, 1 Ch. at p. 370.

[8] *Exchange Telegraph Co.* v. *Gregory*, 1896, 1 Q. B. 147, at p. 153.

of contract is not the legal and natural, but an illegal, consequence of the act of procuring.[1] "It does not lie in a man's mouth to say that the consequence which he deliberately planned and procured is too remote for the law to treat as a consequence."[2]

In the second class of cases, one person induces another person to do or to abstain from doing some act, which that other person has a legal right to do or to abstain from doing, and injury is caused thereby to a third person. When has the injured person a right of action against the person who induces the doing of that act? This question frequently arises in trade union law. It is now certain that it is not tortious for one person to induce or persuade another to do or to abstain from doing some act which he may lawfully do or abstain from doing, even though a third person suffers loss or damage thereby, so long as the inducement or persuasion is not effected by illegal means. This is perhaps the only definite conclusion which can safely be extracted from the decision in *Allen* v. *Flood*. This case served the useful purpose of affirming that "malice," in the popular sense, should play no part in complicating these simple principles of law, as it had threatened to do since the middle of the last century.[3] In fact, in *Temperton* v. *Russell*,[4] in 1893, the Court of Appeal had held that there was a good cause of action against the defendant for conspiring to injure the plaintiff by inducing certain persons not to enter into contracts with him, and that there was no distinction in the law between this and conspiring to injure the plaintiff by procuring persons to break their contracts with him, malice (in the sense of an intention to injure the plaintiff or to benefit the persons inducing or procuring at the expense of the plaintiff) being present in each case.[5] Again, in the *Mogul Case*,[6] greater attention was paid to the subject of "malice" than most commentators on it have been prepared to admit.[7] In *Allen* v. *Flood*,[8] however, the majority of the House of Lords dis-

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[1] *Vicars* v. *Wilcocks*, 8 East, 1; 2 Sm. L. C. 501; cf. *Lynch* v. *Knight*, 1861, 9 H. C. L. 577; *Glamorgan Coal Co. Case*, 1905, A. C. 239.

[2] Pollock, *Torts* (13th Edn.), p. 344.

[3] See Sir W. Erle's *Memorandum on the Law*, 1868, pp. 67–72; *ante*, p. 45.

[4] 1893, 1 Q. B. 715; cf. *Mogul Case*, 1892, A. C. at p. 47.

[5] Reliance was placed on *Gregory* v. *Duke of Brunswick*, 6 M. & G. 953, and the *Mogul Case*.

[6] 23 Q. B. D. 598; 1892, A. C. 25.

[7] This is especially true of the well-known judgment of Bowen, L.J., in which he was not far from saying that an intention to injure, or "malice," makes the difference between the legality and the illegality of an act which causes wilful harm to another (23 Q. B. D., at pp. 614–620; similarly, 1898, A. C. at pp. 112–14, *per* Lord Ashbourne, at p. 84, *per* Lord Halsbury, and at p. 156, *per* Lord Morris; cf. *Flood* v. *Jackson*, 1895, 2 Q. B. 21).

[8] 1898. A. C. 1.

approved of the tendency of certain *dicta* in *Temperton* v. *Russell*,[1] and some *dicta* of Bowen, L.J., in the *Mogul Case* were severely criticised by Lord Herschell.[2] In *Bradford Corporation* v. *Pickles*,[3] a case concerning the user of property, the House of Lords had decided that a lawful act does not become an unlawful one through an ill motive, nor does an unlawful act become lawful through a good motive, and *Allen* v. *Flood* is authority that that ruling is equally applicable to the exercise by an individual of his rights other than rights of property.[4] According to Lord Watson : " The law of England does not . . . take into account motive as constituting an element of civil wrong." [5] Lord Herschell's judgment did much to clarify the distinction between two opposing doctrines as to the right to exercise one's trade or calling.[6] While one doctrine maintains that a plea of competition may justify what is *primâ facie* illegal, as being an obstruction to another's exercise of his right to a free course of trade or employment, the other doctrine asserts that injury may with impunity be caused to another in the course of competition or otherwise, so long as the competition or other injurious acts involve only acts which are in themselves legal.[7] This distinction need not, after all, prove so substantial as to produce contrary decisions.

In the decision of the House of Lords in *Sorrell* v. *Smith*,[8] in 1925, Lord Dunedin interpreted *Allen* v. *Flood* as deciding that where injury is caused by an individual, the motive of the actor is of no significance in deciding whether he has committed a civil wrong. Viscount Cave, L.C., was not so emphatic ; in fact, he declined, since the case did not require a decision on the point, to assert that the

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[1] *Per* Lord Esher, M.R., 1893, 1 Q. B., at pp. 728–9.

[2] 1898, A. C., at pp. 139–140. The facts in *Allen* v. *Flood* were that some ironworkers who were members of a trade union and who were employed by the day on the ironwork of a ship objected to work in the same yard with the plaintiffs, who were shipwrights employed to execute repairs to the woodwork, on the ground that the latter had previously worked at ironwork in other yards. The ironworkers called in the district delegate of their union (the defendant), who informed the employers that the ironworkers would cease work unless the plaintiffs were discharged that day. In consequence of this threat, the plaintiffs were discharged at the end of the day—(*i.e.* without breach of contract). An action was brought against the defendant for maliciously, and with intent to injure the plaintiffs in their trade or calling, inducing their employers to discharge them and refuse to engage them again. It was held by the House of Lords that the action failed.

[3] 1895, A. C. 587.

[4] See also *Stevenson* v. *Newnham*, 1853, 13 C. B. 285, at p. 297.

[5] 1898, A. C., at p. 92.

[6] 1898, A. C., at pp. 139–40.

[7] See *ante*, pp. 44–5. The second doctrine places the burden of proof on the plaintiff.

[8] 1925, A. C. 700.

tort committed by a combination of two or more persons, the main purpose of which is wilfully to injure a man in his trade, cannot be committed by one individual.[1] These *dicta* are *obiter*, and the authority of *Allen* v. *Flood* for the proposition stated above remains good. The House of Lords in *Quinn* v. *Leathem* certainly understood *Allen* v. *Flood* as so deciding.[2]

As to the import of "justification" in these cases, Lord Dunedin, in *Sorrell* v. *Smith*, said that he looked at the facts of a case not as a means of deciding whether there was justification for what, without justification, would be an illegal act, but as evidence of whether there was any proof of illegal action. The act which interferes may be *per se* just as lawful an act as the act which is interfered with.[3]

To sum up: an individual will incur civil liability if

(*a*) he employs illegal means to induce another person to do some act which causes damage to a third person, even though that other person was within his rights in doing that act; or

(*b*) he knowingly procures another person to break a contract made with a third person to the injury of the third person;

unless, in either case, there is legal justification for the act of inducing or procuring.

It is not possible to give an exhaustive definition of "illegal means,"[4] but certain specific acts have been held to constitute illegal means. The intentional firing of a cannon on natives off the coast of Africa, which caused them to refrain from trading with the plaintiff[5]; the employment of threats of personal violence and of vexatious litigation in order to coerce workmen not to work for the plaintiff[6]; the intentional disturbance of wild fowl in a decoy by the firing of a gun[7]; have been held to constitute illegal means. The illegal means may take the form of a distinct species of tort or crime, *e.g.* nuisance (by watching and besetting a house or place in order to compel a person to do some act, which diminishes the enjoyment of the property),[8] fraud,[9] misrepresentation (if wilful),[10] defama-

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[1] *Ibid.*, at p. 714; citing *Kearney* v. *Lloyd*, 1890, 26 I. R. 268, and *Huttley* v. *Simmons*, 1898, 1 Q. B. 181.

[2] The *dicta* of Bowen, L.J. (23 Q. B. D., at pp. 614–617), still require explanation by the House of Lords.

[3] 1925, A. C., at pp. 727–8; see also at p. 748, *per* Lord Buckmaster, and at p. 742, *per* Lord Sumner.

[4] *Pratt* v. *B. M. A.*, 1919, 1 K. B. 244, *per* McCardie, J.

[5] *Tarleton* v. *M'Gawley*, 1793, 1 Peake, 270.

[6] *Garret* v. *Taylor*, 1620, Cro. Jac. 567.

[7] *Keeble* v. *Hickeringill*, 1707, 11 East, 574, n.

[8] *Lyons* v. *Wilkins*, 1899, 1 Ch. 255.

[9] *National Phonograph Co.* v. *Edison-Bell Co.*, 1908, 1 Ch. 335.

[10] 1898, A. C., at p. 142, *per* Lord Herschell.

tion,[1] or obstruction of a highway.[2] In several cases acts have been deemed to be illegal as constituting " threats " or " coercion," though nothing in itself illegal was threatened. Lord Lindley, in *Quinn* v. *Leathem*, drew a distinction between giving information or a warning or intimation to an employer that his men mean to strike (as in *Allen* v. *Flood*), and causing the men to strike by peremptory orders whether they want to strike or not (as in *Quinn* v. *Leathem*), and he ruled that a threat of the second kind would be illegal unless it could be justified.[3]

Two opinions have since been expressed as to the basis of the decision in *Quinn* v. *Leathem*. One opinion holds that it was based on the view that a " conspiracy to injure " is a distinct species of tort ; the other, that it was based on the illegal character of the threats and coercion used. The latter opinion has not regarded conspiracy as a separate tort, but has held that evidence of the employment of illegal means is necessary and has construed illegal " threats " as including threats to do certain acts which are not in themselves illegal. Thus, in *Pratt* v. *British Medical Association*,[4] it was held that threats to inflict the slur of professional dishonour by means of circulated black lists, constituted illegal means, and it was asserted that means may be unlawful though no specific part of the conduct employed amounts to an actionable wrong.[5] In this and similar cases,[6] the terms " coercion " and " threat " have not been precisely defined. It seems that coercion involves something in the nature of the negation of choice. It has been suggested that the question might be put in this form : whether, as a matter of fact, the persuasion is of such weight that the resulting act is in substance the act of the person persuading.[7] On the other hand, the supporters of the " conspiracy theory " have maintained that a threat will only be illegal if it is a threat to do an act which is either a criminal or a civil wrong,[8] and that where workmen have a right to leave their work, a threat made to their master to leave their work cannot be treated differently, because it is simply a threat to do an act which it is within their discretion to do. Otherwise, only a lightning strike would be legal.[9] The judgments in *Sorrell* v. *Smith*, which seem definitely to recognise conspiracy as a distinct tort, also affirm the very narrow view of the terms " threat " and

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[1] *Ware and De Freville* v. *Motor Trade Assocn.*, 1921, 3 K. B., at p. 60.

[2] 1898, A. C., at p. 173, *per* Lord Davey.

[3] 1901, A. C., at p. 538.

[4] 1919, 1 K. B. 244.

[5] *Ibid.*, *per* McCardie, J., at p. 260.

[6] *Santen* v. *Busnach*, 1913, 29 T. L. R. 214 ; *Valentine* v. *Hyde*, 1919, 2 Ch. 129, *per* Astbury, J. ; *Davies* v. *Thomas*, 1920, 1 Ch. 217.

[7] *Hodges* v. *Webb*, 1920, 2 Ch. 70, *per* Peterson, J. ; Pollock, *Torts*, p. 346.

[8] 1898, A. C. at p. 129, *per* Lord Herschell.

[9] *Hodges* v. *Webb*, *loc. cit.* ; and *Ware's Case*, 1921, 3 K. B. at p. 60.

"coercion," [1] so that it seems that coercion, to be illegal, must, intrinsically and irrespective of the motive, involve either a criminal or a civil wrong.[2] The objects of an act, or the results which will necessarily or naturally follow from the circumstances in which it is committed, can, however, give to coercion a wrongful character and should be distinguished from the motive of the actor.[3] Illegal conspiracy may, it seems, be regarded as a species of illegal means.[4]

A person who, by the employment of unlawful means, induces another to do some lawful act to the detriment of a third person, may be saved from civil liability by proof of justification, if his acts are only *primâ facie* illegal, although the element of illegality be an illegal conspiracy. The same rules apply to this class of cases as apply to cases of procurement of a breach of contract. In *Giblan's Case* it was held that there was no justification where, by threats of calling out their employees on strike, certain employers were induced to dismiss the plaintiff, in order to force him to pay a debt due to a trade union and to punish him for not paying it, though his fellow workmen had not objected to work with him.[5]

Civil conspiracy, like criminal conspiracy, can be traced back to the ancient statutes—the Ordinances and Statute of Conspirators.[6] The scope of the tort, like that of the crime, was later broadened; this was effected by allowing actions on the case in the nature of conspiracy.[7] During the eighteenth and nineteenth centuries, the crime of conspiracy gradually extended until there was reason for saying that a conspiracy to injure a man in his property or trade was criminal, though no acts were done or contemplated in pursuance thereof which would be criminal or even tortious if done by individuals without concert,[8] and it seems to have been reasoned from this that under certain circumstances it might be actionable for two or more persons in combination to do acts which, if done without concert, would not be criminal or actionable.[9]

The cases are sharply divided according as they support one or

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[1] 1925, A. C. at p. 730, *per* Lord Dunedin; at p. 737, *per* Lord Sumner; and at p. 747, *per* Lord Buckmaster.

[2] Cf. 1898, A. C. at p. 98, *per* Lord Watson.

[3] *Ibid.*

[4] 1925, A. C. at p. 719, *per* Lord Dunedin.

[5] *Giblan* v. *National Amalgd. Labourers' Union, etc.*, 1903, 2 K. B. 600; *Conway* v. *Wade*, 1909, A. C. 506.

[6] 21 Edw. I.; 28 Edw. I., stat. 3, c. 10; 33 Edw. I., stat. 2; see *ante*, p. 14.

[7] *Skinner* v. *Gunton*, 1 Wm. Saunders, p. 229, b (4), 230.

[8] *R.* v. *Rowlands*, *R.* v. *Duffield*, 1851, 5 Cox, 404; *R.* v. *Druitt*, 1867, 10 Cox. at pp. 600–1.

[9] *Gregory* v. *Duke of Brunswick*, 1843, 1 C. & K. 23; 6 M. & G. 205; *Mogul Case*, 23 Q. B. D. 598; *Temperton* v. *Russell*, 1893, 1 Q. B. 715.

other of two conflicting theories. On the one hand, it is claimed: (1) that if there is an intention to injure another person, rather than to protect or advance the interests of the actors, the fact that the acts which cause pecuniary damage to that other person are done or procured to be done by two or more persons acting in combination will render those combining civilly liable, though, without that combination, those acts may not be actionable. On the other hand, it is maintained (2) that conspiracy cannot be the gist of a civil action; that there must be some illegal means employed or illegal object pursued which would give a right of action against an individual or individuals acting without concert, and that the element of combination is important merely as evidencing wrongful intention, or in the assessment of damages recoverable for the wrongful acts. The passing of the Trade Disputes Act, 1906, was the direct consequence of the great uncertainty of the law as to individual and joint liability in tort for interference with employers and workmen.

The controversy has centred principally round *Quinn* v. *Leathem*. Only one judgment delivered in the House of Lords (that of Lord Lindley) seems to have been based solely on the view that illegal means in the form of coercive threats and black-lists had been employed.[1] The other judgments seem to have rested the defendants' liability (either partly or solely) on their having entered into a combination whose main aim was to injure the plaintiff, apart altogether from any question whether means *per se* illegal had been used in furthering the aim of the malicious conspiracy.[2]

The House of Lords in *Sorrell* v. *Smith* seems to have terminated the main conflict. It decided that a combination of two or more persons wilfully to injure a man in his trade is unlawful, and, if it results in damage to him, is actionable, but that if the real purpose of the combination is not to injure another, but to forward or defend the trade of those who enter into it, then no wrong is committed and no action will lie, although damage to another ensues, so long as no

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[1] 1901, A. C. at p. 532.

[2] Of the cases decided after *Quinn* v. *Leathem*, in some of them the view was taken that that decision was in direct line with the long series of decisions commencing with *Garret* v. *Taylor*, in which illegal means employed against another for the purpose of injuring a third person were proved, *Kearney* v. *Lloyd*, 1890, 26 I. R. 268; *Giblan's Case*, 1903, 2 K. B. 600; *Sweeney* v. *Coote*, 1906, 1 I. R. 51; *Pratt* v. *B. M. A.*, 1919, 1 K. B. 244. In other cases, it was taken as having finally laid down that a "conspiracy to injure" may be actionable, if damage flows from it, though no acts are done in pursuance of it which would be actionable if done by individuals without concert (*Temperton* v. *Russell*, 1893, 1 Q. B. 715; *Sweeney* v. *Coote*, 1907, A. C. at p. 222; *Hodges* v. *Webb*, 1920, 2 Ch. at p. 92; *Ware's Case*, 1921, 3 K. B. 40). It is impossible to reconcile the two lines of cases.

means in themselves unlawful are used.[1] " Malice " is a term which, owing to its double significance, may and should be dispensed with in these cases ; if it imports personal enmity or spite or some other evil motive, it is neither an essential element in the offence nor conclusive of the offence having been committed ; if it means only that the act complained of is wrongly and knowingly done, or that it is done for the purpose of injuring another, it is rightly used in this connection.[2] Still, the motive of the actors is of vital importance.[3] It is the prime consideration in civil conspiracy because the essence of conspiracy on which the civil action is founded is a criminal conspiracy. It may be assumed that the law is now different in the case of acts of individuals from what it is in the case of acts done in pursuance of a combination.[4] Lord Sumner, in *Sorrell* v. *Smith*, made several pertinent criticisms of the anomalies of the law as now declared. He asks : what if the motives of persons combining be mixed ? Can the reasonableness of their acts be considered ? Does action which would be quite legal if done by a single trader become illegal if taken by him after giving a trivial share in his business to a junior partner ? Is it not often the case that one trader is more powerful than a number of smaller traders, who combine to compete with him ? He concludes that " if . . . this kind of tort really depends on the difference between standing up to one person, and giving way to two, it seems to be only a special illustration of torts arising from intimidation." [5]

The Trade Disputes Act, 1906[6]

The extent to which the Trade Disputes Act, 1906, exempts trade unions and persons acting in trade disputes from liability which would be incurred at common law will now be considered. The relevant provisions are contained in Sections 1, 3 and 4.[7]

Section 1.—The following paragraph shall be added as a new paragraph after the first paragraph of section 3 of the Conspiracy and Protection of Property Act, 1875 :

" An act done in pursuance of an agreement or combination by two or more persons shall, if done in contemplation or furtherance of a trade

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[1] 1925, A. C. 700, at p. 719, *per* Lord Dunedin, and pp. 712–714, *per* Viscount Cave, L.C.

[2] 1925, A. C., at p. 714, *per* Viscount Cave, L.C.

[3] " Motive " and " intention " have been used interchangeably, and the meaning of one runs into the other (*ibid.*, at p. 724).

[4] But see *dicta* of Viscount Cave, L.C., *Sorrell* v. *Smith*, *loc. cit.*, see *ante*, p. 140.

[5] 1925, A. C., at p. 740.

[6] 6 Edw. VII, c. 47.

[7] S. 2 relates to picketing. S. 4 is set out below, pp. 150, 152.

dispute, not be actionable unless the act, if done without any such agreement or combination, would be actionable."

Section 3.—An act done by a person in contemplation or furtherance of a trade dispute shall not be actionable on the ground only that it induces some other person to break a contract of employment, or that it is an interference with the trade, business or employment of some other person, or with the right of some other person to dispose of his capital or his labour as he wills.[1]

Section 5 (3) provides that in the Act of 1906 and the Act of 1875 the expression

"trade dispute" means any dispute between employers and workmen, or between workmen and workmen, which is connected with the employment or non-employment, or the terms of the employment, or with the conditions of labour, of any person;[2]

and the expression

"workmen" means all persons employed in trade or industry, whether or not in the employment of the employer with whom a trade dispute arises.

Since the Act of 1906 curtails, and to some extent abrogates, the rights of His Majesty's subjects at common law, the provisions of the Act should be construed with reasonable strictness and should not be given a meaning wider than the words used will justify.[3] The burden is on the defendant to show that what was done was in contemplation or furtherance of a trade dispute.[4]

"*Trade dispute.*"—It is a question for the jury whether or not there is a trade dispute, and consequently it is not easy to lay down any general rule for all cases.[5] A mere personal quarrel or grumbling or an agitation will not suffice.[6] Section 5 (3) omits from its definition of a trade dispute a dispute between employers and employers. There is nothing in the Act to justify the Court in holding that a dispute, not in its origin a trade dispute, will become a trade dispute merely because the officials of a workmen's union or the workmen themselves choose to assist one side or the other. Nevertheless, circumstances are

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[1] The words "in contemplation or furtherance of a trade dispute" occur in ss. 1, 2 (1), 3, 4 (2) of the Act of 1906, in s. 3 of the Act of 1875, as amended by s. 5 (3) of the Act of 1906, and in s. 3 (1) of the Act of 1927.

[2] Cf. s. 5 (3) with s. 3 of the 1875 Act, which applied only to disputes "between employers and workmen." These words were repealed by s. 5 (3), probably because of the construction placed on the expression "trade dispute" in *Lyons* v. *Wilkins*, 1896, 1 Ch. 811.

[3] *Larkin* v. *Long*, 1915, A. C., at p. 832, *per* Lord Parker.

[4] *Ibid.*, at p. 836, *per* Lord Sumner.

[5] *White* v. *Riley*, 1921, 1 Ch., at p. 18.

[6] *Conway* v. *Wade*, 1909, A. C., at p. 510.

conceivable in which such a dispute might change its character so as to develop into a trade dispute in its later stages. In *Larkin* v. *Long*,[1] a trade union, believing that the existence of a certain association of master stevedores would benefit the workmen, procured some dock labourers in the service of the plaintiff to break their contracts with him, with the object of compelling him to join the association. The only dispute was one between the association and the plaintiff employer. It was held that the trade union, by aiding the association in its dispute, did not change the character of the dispute into one between employers and workmen, to which the Act would apply. In *Hodges* v. *Webb*[2] there had been a dispute between a masters' association and a trade union concerning the question of the employment of non-union labour in general. The union men threatened to strike unless the plaintiff, a non-unionist, was dismissed. The strike took place, and the plaintiff was dismissed. It was held that there was a dispute between employers (the masters' association) and workmen (the trade union which called the strike), connected with the employment of non-union labour, and so, a dispute to which the Act applied.[3]

"*In contemplation or furtherance of a trade dispute.*"—These words mean that either a dispute is imminent and the act is done in expectation of and with a view to it, or the dispute is already existing and the act is done in support of one side to it.[4] Or, as it has been expressed :

> It is help, assistance, or encouragement to such a dispute that the Legislature apparently had in view when it used the words "in furtherance." Must it not, when it uses, in juxtaposition with these words, the words "in contemplation," be held to have had in view a dispute which must, at the time the act it designed to protect was done, have been, at all events, "thought of" by some person who should be a party to it when it arose, if it was to be a trade dispute within the meaning of the Act ?[5]

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[1] 1915, A. C. 814.

[2] 1920, 2 Ch. 70, in which Peterson, J., criticised the decision of Astbury, J., in *Valentine* v. *Hyde*, 1919, 2 Ch. 129. Peterson, J.'s view was upheld by the Court of Appeal in *White* v. *Riley*, 1921, 1 Ch. 1.

[3] Cf. *White* v. *Riley*, *loc. cit.* It is not consistent with s. 5 (3) to hold that a trade dispute means no more than a dispute between an employer and his men or between his men alone (*Dallimore* v. *Williams*, 29 T. L. R., at p. 68).

It may probably be assumed that the business of presenting histrionic performances to the public for profit is a "trade or industry," in which actors are workmen, within s. 5 (3) (*Brimelow* v. *Casson*, 1926, 1 Ch. 302). A musician may be engaged in "trade or industry" as a workman (*Dallimore* v. *Williams*, *loc. cit.* ; cf. *Wolstenholme* v. *Amalgamated Musicians' Union*, 1920, 2 Ch. 388).

[4] *Conway* v. *Wade*, 1909, A. C. 506, *per* Lord Loreburn, L.C., at p. 512.

[5] *Ibid.*, at pp. 517–518, *per* Lord Atkinson ; and see *Milligan* v. *Ayr Harbour Trustees*, 1915, S. C., at p. 951, where it is suggested that a trade dispute, to be "in contemplation," must be contemplated by both sides.

Whether a trade dispute is actual, impending or probable is a question of fact in each case.[1]

As to the position of acts done by persons other than parties to the dispute, there are important *dicta* in *Conway* v. *Wade*.[2] Cozens-Hardy, M.R., in the Court of Appeal, said :

> I am unable to limit the generality of section 3. It cannot fairly be confined to an act done by a party to a dispute. An outsider, a mere busybody, is equally exempt from liability, although he may induce either masters or men to break contracts of employment.[3]

But the words "in contemplation or furtherance," in some sense, import motive, and it seems that the position of an outsider does depend, to some extent, on his motive in interfering. Lord Loreburn, L.C., in *Conway* v. *Wade*, said :

> I agree with the Master of the Rolls that the section cannot fairly be confined to an act done by a party to the dispute. I do not believe that was intended. A dispute may have arisen, for example, in a single colliery, of which the subject is so important to the whole industry that either employers or workmen may think a general lock-out or a general strike is necessary to gain their point. Few are parties to, but all are interested in the dispute. If, however, some meddler sought to use the trade dispute as a cloak beneath which to interfere with impunity in other people's work or business, a jury would be justified in saying that what he did was done in contemplation or in furtherance, not of a trade dispute, but of his own designs, sectarian, political, or purely mischievous, as the case might be.[4]

The words "in contemplation or furtherance of" do not cover coercive interference where the intervener may have in his mind that, if he does not get his own way, he will thereupon take ways and means to bring a trade dispute into existence.[5]

Apparently, it is unnecessary in order to get the protection of the Trade Disputes Act, to prove that the act done was done entirely in furtherance of a trade dispute, and that the actor's mind was entirely free from malice.[6] The words "in furtherance of a trade dispute"

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[1] 1909, A. C., at p. 522, *per* Lord Shaw.

[2] This case was concerned with s. 3, but in so far as it construes "in contemplation or furtherance of," it seems applicable to all sections in which these words appear.

[3] 1908, 2 K. B., at p. 849.

[4] 1909, A. C., at p. 512. Followed by Lord Dundas in *Milligan's Case*, *loc. cit.*; cf. *M'Cusker* v. *Smith*, 1918, 2 I. R. 432.

[5] 1909, A. C., at p. 522.

[6] *Dallimore* v. *Williams*, 29 T. L. R., at p. 68 ; and 30 T. L. R., at p. 433 ; but cf. *Larkin* v. *Long*, 1915, A. C., at p. 837.

do not seem to cover the act of a peacemaker seeking to bring such a dispute to an end.[1]

Section 1.—Section 1 of the Act of 1906 adds a new paragraph to the first paragraph of Section 3 of the Conspiracy and Protection of Property Act, 1875.[2] It exempts any act done in pursuance of an agreement or combination, if done in contemplation or furtherance of a trade dispute, from any liability to civil proceedings arising from the existence of such agreement or combination. In other words, such act will not be protected by Section 1, if it would be actionable if done by an individual or by individuals without any such agreement or combination. The section, therefore, exempts certain acts from the application of the law of civil conspiracy, if they are done in contemplation or furtherance of a trade dispute, but not otherwise. It applies to all persons, and not merely to members or agents of trade unions.

It seems that Section 1 was added as a new paragraph to Section 3 of the Act of 1875, in order that it may be read subject to the other paragraphs of that section, which provide that nothing in the section shall exempt from punishment any person guilty of a conspiracy for which a punishment is awarded by any Act of Parliament, or shall affect the law relating to riot, unlawful assembly, breach of the peace, or sedition, or any offence against the State or the Sovereign.[3]

The language of Section 1 seems to assume that an act, if done in pursuance of a combination, may sometimes be actionable at common law, although such act if done by an individual without concert may not be actionable.[4] If, however, conspiracy is not a separate tort at common law, the only change made by Section 1 is in regard to civil liability incurred by a person who enters into a criminal conspiracy which causes pecuniary damage to another. A party to an agreement or combination, who is not relieved by Section 1, may sometimes still be protected by Section 3.

Section 3.—Section 3 frees from civil liability certain acts by individuals done in contemplation or furtherance of a trade dispute, which at common law would or might be actionable. It was directed at several uncertainties in the law which were a great source of danger to the rights of persons engaged in trade disputes.

The substance of Section 3 is that an act done by a person in contemplation or furtherance of a trade dispute shall not be actionable *on the ground only* [5] that :

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[1] 1908, 2 K. B., at p. 850.

[2] *Ante*, pp. 115–6.

[3] *Ante*, p. 115.

[4] *Sorrell* v. *Smith*, 1925, A. C., *per* Lord Cave, L.C., at p. 713.

[5] The words in italics are important. It seems that if violence or unlawful threats or other illegal means are employed in inducing or interfering, the pro-

(*a*) it induces some other person to break a contract of employment ; or that

(*b*) it is an interference with the trade, business or employment of some other person ; or that

(*c*) it is an interference with the right of some other person to dispose of his capital or his labour as he wills.

It has been suggested above [1] that an interference of either of the kinds named in (*b*) and (*c*) is not at common law actionable in itself, but only in so far as it involves the doing of an act which is a civil or criminal wrong. Section 3 cannot be regarded as satisfactory until such terms as "threat," "coercion," and "intimidation" have been more precisely defined in the law of torts. It is probable that, at the present time, they comprise only threats of illegal acts and compulsion produced by such acts.[2]

Section 3 extends to all persons. In cases covered by its terms, there is no longer any question as to whether there is "sufficient justification." The condition contained in the words "in contemplation or furtherance of a trade dispute" is made sufficient.[3] The person who is induced to break his contract is not protected by Section 3, even when the person who induces him is protected.[4]

Section 4.—This section was framed to protect trade unions from the consequences of the decision of the House of Lords in the famous case of *Taff Vale Railway Co.* v. *The Amalgamated Society of Railway Servants*.[5] An action was brought against a registered trade union and two of its officials, claiming an injunction to restrain the agents of the defendants from watching and besetting workmen whom the company had engaged to replace workmen on strike, and from persuading them to break their contracts with the company ; and, later, an action was brought against the trustees of the union and the two

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tection of s. 3 will be lost, even though the actor is acting in contemplation or furtherance of a trade dispute, because then there will be some other ground of common law liability (*Conway* v. *Wade*, 1909, A. C., at p. 511 ; *Valentine* v. *Hyde*, 1919, 2 Ch., at p. 154 ; *Brimelow* v. *Casson*, 1924, 1 Ch. at p. 314).

[1] *Ante*, p. 134.

[2] *Sorrell* v. *Smith*, 1925, A. C. 700 ; *ante*, p. 141.

[3] In view of the words "on the ground only," it seems that s. 3 does not cover any act which induces a person to break a contract which is not a contract of employment (1924, 1 Ch. 302 ; *Royal Mutual Insurance Society, Ltd.* v. *Williamson*, 1921, 37 T. L. R. 742).

[4] An action which is prohibited by s. 3 of the 1906 Act cannot be maintained by merely changing its name and calling it an action for breach of s. 7 of the Act of 1875 because the question of whether the acts are or are not actionable must be considered apart from s. 7 altogether (*Fowler* v. *Kibble*, 1922, 1 Ch. 487).

[5] 1901, A. C. 426.

officials, claiming damages also. The conclusions to be drawn from this case [1] have been summarised as follows :

> . . . that a trade union, registered or unregistered, could be sued in respect of torts committed by its agents in a representative action, provided the selected defendants were fairly representative of it ; that a registered society might be sued in its registered name ; and that if the trustees were made defendants in such actions, an order could be made by the Court binding on them for the payment by them of the damages and costs recovered, out of the funds of the society in their hands.[2]

Equitable execution against the property of the trade union held by the trustees could be obtained in the original suit, if they were made parties to it.[3] To add the trustees obviated the necessity for bringing a second action against the trustees to recover the amount of damages and costs which the judgment had converted into a specialty debt.

Section 4 (1) provides that :

> an action against a trade union, whether of workmen or masters, or against any members or officials thereof on behalf of themselves and all other members of the trade union in respect of any tortious act alleged to have been committed by or on behalf of the trade union, shall not be entertained by any Court.

The immunity granted to trade unions in this provision is not confined to actions in respect of torts committed in contemplation or furtherance of trade disputes, or in respect of torts which, though committed by the agents of trade unions in the course of their employment, are not authorised or ratified by the governing body. This is so in spite of the inclusion of the words " in contemplation or furtherance of a trade dispute " in the other sections and in Section 4 (2), and whatever may have been the policy of the Legislature in enacting Section 4. Section 4 is not consequential on the other sections.[4] The Act of 1906 has no underlying consistent scheme or plan.[5] But Section 4 (1) is neither self-contradictory, nor repugnant to the other provisions of the Act ; it is unambiguous, comprehensive, and imperative.[6]

Section 4 (1) expressly mentions the form of representative action, and also the form of action against the trade union itself. It gives

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[1] And from *Duke of Bedford* v. *Ellis*, 1901, A. C. 1.

[2] *Vacher & Sons, Ltd.* v. *The London Socy. of Compositors*, 1913, A. C. 107, *per* Lord Atkinson, at p. 120 ; cf. 1901, A. C., at p. 443, *per* Lord Lindley.

[3] *Ibid.*, 1913, A.C. at pp. 112, 120, 127.

[4] *Vacher's Case*, 1913, A. C. 107 ; s. 4 refers to the Trade Union Act, 1871, and is really an extension of it (*ibid.*, at p. 119).

[5] *Ibid.*, at p. 124, *per* Lord Atkinson.

[6] *Ibid.*, at p. 126, *per* Lord Shaw.

protection to trade unions against actions of tort brought in either form, not by furnishing them with a defence but by prohibiting the courts from entertaining such actions at all.[1]

The words "any tortious act" in Section 4 (1) are unqualified. They comprise (*inter alia*) actions for libel,[2] malicious prosecution,[3] money had and received.[4] The words "whether of workmen or masters" are not words of limitation, and they do not comprise every kind of trade union covered by Section 4 (1). Hence, Section 4 (1) probably may apply to a combination to impose restrictive conditions on any trade or business.[5] "The test of a trade union is its objects, not its personnel."[6] In this connection the expression "trade union" carries the same meaning in the Act of 1906 as in the Act of 1913.

Section 4 (1) protects only the corporate funds of a trade union. It does not affect the personal liability of any individual, such as a member, official or agent of a trade union, who commits a tort. He may be made personally liable,[7] but he cannot be sued on behalf of himself and all other members of the union.[8]

Though the wording of Section 4 (1) is "alleged to have been committed," it is likely that the section applies to tortious acts about to be committed.[9] Otherwise, injunctions might be obtained to restrain the commission of acts for which, when committed, no damages could be claimed.

Section 4 (1) does not apply to the case of an expelled member of a trade union suing in respect of a breach of his contractual rights under the rules of the union, as, for instance, by expulsion.[10]

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[1] *Ibid.*, at p. 127, *per* Lord Moulton; and at p. 126, *per* Lord Shaw.

Any such action will be summarily dismissed upon an application under Order XXV, r. 4. It is very doubtful whether a representative action can be brought under Order XVI, r. 9, against an unregistered trade union (in spite of the *dicta* of Lords Lindley and Macnaghten in the *Taff Vale Case*) because the absent members of the unincorporated association, whom the selected defendants represent, have no opportunity of defending themselves, and may not all wish to rely on the same defences, so that it is unfair that a judgment binding them should be pronounced for damages for conspiracy—or for money had and received (*Hardie & Lane, Ltd.* v. *Chiltern*, 1928, 1 K. B. 663; *Walker* v. *Sur*, 1914, 2 K. B. 930 (case of contract); *Merc. Marine Assocn.* v. *Toms*, 1916, 2 K. B. 243 (case of tort)).

[2] *Vacher's Case*, *loc. cit.*

[3] *Bussy's Case*, 1908, 24 T. L. R. 437.

[4] *Hardie & Lane, Ltd.* v. *Chiltern*, 1928, 1 K. B. 663.

[5] S. 16 of the 1876 Act and Section 1 (2) of the 1913 Act.

[6] *Hardie & Lane, Ltd.* v. *Chiltern*, *loc. cit.*, at p. 697, *per* Lord Hanworth, M.R.

[7] Although, of course, he may be able to rely on ss. 1 and 3 of the 1906 Act.

[8] *Rickards* v. *Bartram*, 1908, 25 T. L. R. 181; *Vacher's Case*, 1913, A. C. at p. 130, *per* Lord Moulton.

[9] *Ware's Case*, 1921, 3 K. B. 40, at p. 75, *per* Scrutton, L.J.

[10] *Parr* v. *Lancs. and Ches. Miners' Federation*, 1913, 1 Ch. at p. 374; cf. *Booth* v. *Amalgd. Marine Workers' Union*, 1926, Ch. at p. 921.

Section 4 (2) provides that :

> nothing in this section shall affect the liability of the trustees of a trade union to be sued in the events provided for by the Trade Union Act, 1871, section 9, except in respect of any tortious act committed by or on behalf of the union in contemplation or furtherance of a trade dispute.

Section 9 of the Act of 1871 empowers the trustees of any registered trade union to bring or defend any action, suit, prosecution or complaint, touching or concerning any property, right or claim to property of the union. It may be argued that if Section 4 (2) had not been enacted, Section 4 (1) would have granted complete immunity to trustees in respect of all actions for tort covered by Section 9 of the Act of 1871, and that Section 4 (2) is intended to permit such actions if the tortious act is not done in contemplation or furtherance of a trade dispute.[1] The words " touching or concerning any property " have been construed widely.[2]

Section 4 (2) was closely considered in *Vacher's Case*.[3] Lord Atkinson expressed the following opinion :

> A proceeding against the trustees under section 9 of the Act of 1871 is in fact, if not in form, a proceeding *in rem* against the property of the trade union. In that sense it is an action against the union itself. Judgments for damages against a trade union for torts committed by its agent, in whatever form the action might be brought, can only be satisfied out of the property vested in the trustees ; and it was, I think, apprehended by the Legislature that the wide and positive provisions of sub-section 1 might be taken as practically repealing in part section 9 of the Act of 1871, and thereby conferring on trustees immunity as absolute as that conferred upon the union. This sub-section, while qualifying their liability to some extent . . . was, I think, passed for greater caution to meet this possible danger, and save as to that qualification, to preserve unimpaired the liability imposed on the trustees by section 9 of the Act of 1871.[4]

The sub-section applies only to the trustees of registered trade unions. It would seem that the trustees of an unregistered union will enjoy the same immunity as the union itself and cannot be sued at all in respect of any tort committed by or on behalf of the union.

The Act of 1927

Section 1 (2) of the Trade Disputes and Trade Unions Act, 1927, imposes a punishment upon any person who declares, instigates,

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[1] *Vacher's Case*, 1913, A. C., at p. 131, *per* Lord Moulton.

[2] *Linaker* v. *Pilcher*, 1901, 17 T. L. R. 256.

[3] 1913, A. C. 107.

[4] *Ibid.*, at pp. 124–125 ; also at p. 115, *per* Viscount Haldane, L.C. ; at pp. 131–132, *per* Lord Moulton. Lord Macnaghten (at p. 119), who refrained from construing s. 4 (2), said that it was not easy to see its object, or to understand its precise meaning.

incites others to take part in, or otherwise acts in furtherance of a strike or lock-out, declared by that Act to be illegal.[1] It seems that such an act in furtherance of an illegal strike or lock-out will also be actionable if damage flows from it to another person, whether it is done by an individual or by a combination of individuals. The more important provision is Section 1 (4) of the 1927 Act, which provides that :

> The provisions of the Trade Disputes Act, 1906, shall not, nor shall the second proviso to subsection (1) of section 2 of the Emergency Powers Act, 1920, apply to any act done in contemplation or furtherance of a strike or lock-out which is by this Act declared to be illegal, and any such act shall not be deemed for the purposes of any enactment to be done in contemplation or furtherance of a trade dispute : . . .

An individual doing an act in contemplation or furtherance of an illegal strike or lock-out within the meaning of Section 1 of the Act of 1927 cannot, then, claim the protection of Section 3 of the Act of 1906, nor if two or more individuals act in combination can they claim the protection of Section 1 of that Act. And if tortious acts are committed by or on behalf of a trade union in contemplation or furtherance of such an illegal strike or lock-out, neither the union nor its trustees will be able to rely on Section 4 to obtain immunity from liability.

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[1] *Post*, p. 165.

CHAPTER VI

ILLEGAL STRIKES AND LOCK-OUTS

The Trade Disputes and Trade Unions Act, 1927,[1] declares certain strikes and lock-outs to be illegal.[2] Before examining its provisions, it is proposed to discuss the legality of strikes before the passing of this Act, with special reference to the so-called "General Strike" of 1926.

Before 1927

Section 3 of the Conspiracy and Protection of Property Act, 1875, and Section 1 of the Trade Disputes Act, 1906, contain the law as to strikes which are in contemplation or furtherance of a trade dispute.[3] Section 3 of the Act of 1875 provides:

> An agreement or combination by two or more persons to do or procure to be done any act in contemplation or furtherance of a trade dispute between employers and workmen [4] shall not be indictable as a conspiracy if such act committed by one person would not be punishable as a crime.[5]

The effect of this section is that strikers cannot be indicted for a conspiracy for the mere act of combining to cease work if they act in contemplation or furtherance of a trade dispute, [6] unless the act of striking would be punishable as a crime if done by one person without combination. Two special limitations, however, are set out in Section 3:

> (*a*) Nothing in this section shall exempt from punishment any persons guilty of a conspiracy for which a punishment is awarded by any Act of Parliament.

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[1] 17 & 18 Geo. V, c. 22.

[2] "Strike" and "lock-out" are not strictly corresponding terms. A strike is a simultaneous cessation of work by workmen in combination. But a lock-out may be a cessation of work declared by one employer alone, or by two or more employers acting in combination.

[3] The Act of 1875 was rendered necessary by the decision and *dicta* of Brett, J., in *R.* v. *Bunn* (1872, 12 Cox, 316), which virtually nullified any benefit conferred by the Trade Union Act, 1871, and the Criminal Law Amendment Act, 1871.

[4] S. 5 (3) of the Act of 1906, which defines a "trade dispute," repeals the words "between employers and workmen" in s. 3 of the Act of 1875, *ante*, pp. 117, 145.

[5] S. 3 defines the expression "crime." For a fuller discussion of the section, see *ante*, p. 115.

[6] *Ante*, p. 146.

The object of this limitation seems to be to ensure that if the Legislature imposes a punishment for any particular type of conspiracy to do some act which, if done by one person, would not be punishable as a crime, Section 3 shall not be available to protect such a conspiracy, even though it be in contemplation or furtherance of a trade dispute.[1]

> (*b*) Nothing in this section shall affect the law relating to riot, unlawful assembly, breach of the peace, or sedition, or any offence against the State or the Sovereign.

A change in the civil liability of persons engaging in strikes in trade disputes was effected by Section 1 of the Trade Disputes Act, 1906,[2] which provides :

> The following paragraph shall be added as a new paragraph after the first paragraph of section 3 of the Conspiracy and Protection of Property Act, 1875 :
>
> An Act done in pursuance of an agreement or combination by two or more persons shall, if done in contemplation or furtherance of a trade dispute, not be actionable unless the act, if done without any such agreement or combination, would be actionable.

This provision brings civil liability into line with criminal liability. It exempts from civil liability strikes, or agreements to strike, in contemplation or furtherance of a trade dispute, unless such strikes or agreements involve acts, which, if done without combination or agreement, would be actionable. Civil conspiracy, as a distinct tort, has already been discussed.[3] Since Section 1 of the 1906 Act adds a new paragraph to Section 3 of the Act of 1875, it must be read, like the first paragraph of Section 3, as subject to the two special limitations contained in that section.

Not all strikes or agreements to strike can be said to be in contemplation or furtherance of a trade dispute. Those which are not cannot claim the benefit of Section 3 of the Act of 1875 or Section 1 of the Act of 1906. They will be indictable or actionable, if they incur liability on any ground at common law. The position of strikes and agreements of workmen at common law has already been discussed.[4]

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[1] The Act of 1927 seems to award a punishment for a conspiracy within the meaning of these words, but this point is not likely to arise, in view of s. 1 (4) of the Act of 1927, which declares that any act done in contemplation or furtherance of a strike declared by the Act of 1927 to be illegal shall not be deemed for the purposes of any enactment to be done in contemplation or furtherance of a trade dispute. " Any enactment " will include s. 3 of the Act of 1875.

[2] *Ante*, p. 148.

[3] *Ante*, p. 142 ; *Sorrell* v. *Smith*, 1925, A. C. 700.

[4] *Ante*, pp. 116, 143.

Lord Dunedin, in *Sorrell* v. *Smith*, said :

> In an action against a set of persons in combination, a conspiracy to injure, followed by an actual injury, will give a good cause for action, and motive or intent when the act itself is not illegal is of the essence of the conspiracy.[1]
>
> Now the moment that that is recognised (*i.e.* that the essence of conspiracy on which civil action will lie is a criminal conspiracy), . . . you at once bring in the spirit of the criminal law, where motive or intention—the *mens rea*—is everything.[2]

If this view is correct, the motive or object will be the guiding consideration in determining the question of the legality at common law of a strike or combination of workmen. It will be criminal, and if actual damage follows, actionable, when its object is wilfully to injure a man in his trade, and not to forward or defend the trade of its members.

Great uncertainty attaches to the nature of other common law offences which may be committed by strikers. It is a general principle that a combination to commit a crime is at common law an indictable conspiracy, though there may be some doubt as to whether this applies to all combinations to commit a crime.[3] Strikes may sometimes conceivably border on seditious conspiracies. There does not seem to be any case-law on the question of whether a strike of a political character (*e.g.* to mark disapproval of a nation's entry into a war, or as a gesture of sympathy with a condemned political offender) would be legal or illegal at common law. The law as to seditious conspiracy is so uncertain that it is difficult to speak with assurance on these points. A conspiracy for which an Act of Parliament awards a punishment cannot claim the benefit of Section 3 of the Act of 1875 or Section 1 of the Act of 1906 ; and the law relating to riot, unlawful assembly, breach of the peace, or sedition, or any offence against the State or the Sovereign, is not affected by these sections, whether the conspiracy is or is not in contemplation or furtherance of a trade dispute.[4] It is clear that generally strikes of a strictly political character have no connection at all with a trade dispute, so that these sections of the Acts of 1875 and 1906 will afford them no protection if they are illegal at common law.[5]

The line cannot definitely be drawn between a combination

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[1] 1925, A. C., at p. 724.

[2] *Ibid.*, at p. 725.

[3] The Legislature in 1875 chose to put its own construction on the term " crime " for the purposes of s. 3 of the Act of 1875, *ante*, p. 115.

[4] See s. 3 of the Act of 1875.

[5] See *post*, p. 158, as to the classification of the so-called " General Strike " of 1926.

which is in contemplation or furtherance of a trade dispute and one which is formed for the purpose of injuring another in his trade or business or employment. It is probable that a combination whose principal object is to injure another, rather than to defend or further the interests of those combining, would not be held to be in contemplation or furtherance of a trade dispute. Since, however, this is not settled, the *dicta* of Lord Sumner and Cozens-Hardy, M.R., in *Dallimore* v. *Williams*,[1] may be instructive. Lord Sumner said :

> Whatever might have been the motive of the defendants, . . . it was apparent on the plaintiff's own case that the defendants did in fact get up a trade dispute. Except by confusing the motive of an act with the act itself, he was unable to see how it could be said that the acts complained of were not done in contemplation or furtherance of a trade dispute. The argument for the plaintiffs involved reading the Act as though it spoke of an act " honestly " or " solely " done in contemplation or furtherance of a trade dispute.[2]

Cozens-Hardy, M.R., said that he did not think it necessary for any person, in order to gain the protection of the Trade Disputes Act, to say that the act done was entirely free from malice.[3] There is the question, also, of whether the magnitude of a strike or the nature of the parties to it may not render the strike not " in contemplation or furtherance of a trade dispute," and in this connection the decision and certain *dicta* in *Conway* v. *Wade* [4] are extremely important. The House of Lords need only have decided that a mere mischief-maker or intruder stirring up a trade dispute was not acting in contemplation or furtherance of a trade dispute. But there are certain *dicta* in the judgments given which indicate that the protection of the Act of 1906 is not confined to the actual parties to the dispute. Lord Loreburn, L.C., said :

> I agree with the Master of the Rolls, . . . that the section cannot fairly be confined to an act done by a party to the dispute. I do not believe that was intended. A dispute may have arisen, for example, in a single colliery, of which the subject is so important to the whole industry that either employers or workmen may think a general lock-out or a general strike is necessary to gain their point. Few are parties to, but all are interested in, the dispute.[5]

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[1] 1914, 29 T. L. R. 67 ; 30 T. L. R. 432. In this case only s. 3 of the Act of 1906 was in discussion, but the *dicta* cited refer to the words " in contemplation or furtherance of a trade dispute " in general.

[2] 30 T. L. R., at p. 433.

[3] 29 T. L. R., at p. 68.

[4] 1909, A. C. 506.

[5] *Ibid.*, at p. 512.

These *dicta* seem emphatically to affirm the legality of what is known as a "sympathetic strike," *i.e.* a strike by workmen in the service of one employer, designed to assist a strike in progress between another employer and his workmen.[1] There is nothing in these *dicta* which supports the view that such a sympathetic strike will lose its immunities, if those striking in sympathy or support are employed in a different industry from that in which the dispute has arisen, or if the sympathetic strike is organised on a large scale so as to involve all the principal industries.

The "General Strike," 1926

There were certain arguments for the view that the "General Strike" of 1926 had other objects besides being in furtherance of the mining dispute. For example, it was said that there was an intention, by inflicting suffering and hardship on the community, to force the Government to intervene to pass legislation for, or otherwise to assist, the miners. If this could have been clearly shown, it seems obvious that to the extent that the "General Strike" had objects other than the furtherance of the mining dispute, those engaged in it would have lost the protection of the Acts of 1875 and 1906. The question would remain: Was the "General Strike" illegal at common law? Some learned writers have advanced the proposition that the "General Strike" was not in itself a trade dispute, and therefore it had not the protection of the Acts of 1875 and 1906.[2] It may be suggested, however, that argument overlooks the words "in contemplation or furtherance of."

The legal position of the "General Strike" involves two questions: (*a*) whether, on an interpretation of the words "in contemplation or furtherance of a trade dispute," those engaging in that strike could have claimed the protection of the Acts of 1875 and 1906; and (*b*) whether on some constitutional principle, such as that it was directed against the Government and the community, the "General Strike" was illegal at common law.

(*a*) It has already been suggested[3] that on a fair interpretation

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[1] The mention of a general strike in the *dicta* cited is not to be taken to indicate a strike of the proportions of the "General Strike" of 1926, but rather one general to one industry.

[2] Thus, Sir John Simon has said that "once you get the proclamation of a General Strike such as this is, it is not, properly understood, a strike at all, because a strike is a strike against employers to compel employers to do something, but a General Strike is a strike against the general public to make the public, Parliament and the Government do something" (*Three Speeches on the General Strike*, p. 16).

[3] *Ante*, p. 157.

of the words "in contemplation or furtherance of," the legality of a sympathetic strike cannot be held to be forfeited by reason merely that it is so organised as to affect the whole of one or more of the principal industries. It is difficult to maintain that a strike in the leading industries in support of a dispute in the mining industry would be less in contemplation or furtherance of that dispute than a sympathetic strike in one or only a few minor industries would be, provided that there was no other object which, on constitutional grounds, could be held to be illegal, and sufficient to overshadow the object of furthering the trade dispute. Whether there was such another object in the "General Strike" is a matter of keen political controversy.

(*b*) There is very little authority on the question of whether a "General Strike" of the type of that in 1926 is unconstitutional, and so illegal.

In *R.* v. *Cooper*,[1] *dicta* of Erskine, J., indicated that an agreement made by workmen to leave their work for the purpose of furthering the establishment of the Charter was legal, if legal means were used, but illegal if the parties to it intended, through the pressure of the distress it caused, to produce discontent, tumult and outrage, in order to enforce the adoption of the Charter. This is perhaps authority for the legality of a strike, peaceably conducted, to attain a political object, which is a somewhat different type of strike from the "General Strike." It might even be argued that the *dicta* are authority for holding the "General Strike" illegal, on the ground that it was intended, through the pressure of the distress and hardship caused to the community, to coerce the Government to intervene. But this leads us again on to the very unsafe ground of political controversy.

The case of the *National Sailors' and Firemen's Union of Great Britain and Ireland* v. *Reed*[2] is directly in point. The plaintiff union asked for (i) a declaration that the defendants, as branch secretary and delegates of the plaintiff union, were not entitled, in the name of the plaintiff union, to call members of the plaintiff union out on strike without the authority of the executive council of that union, and (ii) an injunction to restrain the defendants from so doing. Counsel for the union based his claim to an injunction on two grounds: (*a*) that the defendants had acted in breach of the rules and orders of the plaintiff union, and were liable to be restrained as prayed, and (*b*) that they had acted contrary to the common law. The report is unsatisfactory because it does not set out the arguments of either party. Again, since the learned judge found for the plaintiff union on the first ground, his statement of the law as to the other ground of claim was not strictly necessary to the decision.

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[1] 1846, 4 St. Tr. N. S., 1248. [2] 1926, Ch. 536.

The pronouncement of Astbury, J., on the legal position of the "General Strike" was as follows:

> The so-called general strike called by the Trades Union Congress Council is illegal, and persons inciting or taking part in it are not protected by the Trade Disputes Act, 1906. No trade dispute has been alleged or shown to exist in any of the unions affected, except in the miners' case, and no trade dispute does or can exist between the Trades Union Congress on the one hand and the Government and the nation on the other. The orders of the Trades Union Congress above referred to are therefore unlawful, and the defendants are acting illegally in obeying them, and accordingly, . . . can be restrained by their own union from doing so.[1]

It is to be noticed that Astbury, J., did not decide whether the "General Strike" was or was not a sympathetic strike, or whether, if it was a sympathetic strike, it was or was not in furtherance of a trade dispute. His statement, that "no trade dispute has been alleged or shown to exist in any of the unions affected, except in the miners' case," seems to imply that the protection of the Trade Disputes Act is available only for the actual parties to the trade dispute. This view differs from that expressed in *Dallimore* v. *Williams*,[2] and *Conway* v. *Wade*.[3] The crux of the judgment is the statement, "no trade dispute does or can exist between the Trades Union Congress on the one hand and the Government and the nation on the other." The facts regarding the character of the "General Strike," which Astbury, J., summarised, did not show in what way the "General Strike" was directed against the Government and the nation, nor did the learned judge amplify his ruling by citing authority for his conclusion that the orders of the Trades Union Congress were unlawful. It is probable that no authority can be cited. Yet there is little doubt that Astbury, J., decided that the "General Strike" was illegal on the ground that it was in some way, which he did not indicate, directed against the Government and the nation.

The Trade Disputes and Trade Unions Act, 1927

Section 1 of this Act was enacted with the object of ensuring that persons engaging in a strike of the nature of the "General Strike" in future should be punishable under statute. But the criminal liability of such strikers will depend on the terms of Section 1 and the construction placed upon it. Section 1 deals also with lock-outs of the type corresponding to the strikes declared illegal.

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[1] 1926, Ch. 536, at pp. 539–540.
[2] 29 T. L. R. 67; 30 T. L. R. 432.
[3] 1909, A. C. 506.

Section 1 purports to be declaratory of the existing law. It enacts :

It is hereby declared :

(*a*) that any strike is illegal if it

(i) has any object other than or in addition to the furtherance of a trade dispute within the trade or industry in which the strikers are engaged ; and

(ii) is a strike designed or calculated to coerce the Government either directly or by inflicting hardship upon the community ; and

(*b*) that any lock-out is illegal if it

(i) has any object other than or in addition to the furtherance of a trade dispute within the trade or industry in which the employers locking-out are engaged ; and

(ii) is a lock-out designed or calculated to coerce the Government either directly or by inflicting hardship upon the community ;

and it is further declared that it is illegal to commence, or continue, or to apply any sums in furtherance or support of, any such illegal strike or lock-out.

The Section goes on to provide that for the purposes of the foregoing provisions :

(*a*) A trade dispute shall not be deemed to be within a trade or industry unless it is a dispute between employers and workmen, or between workmen and workmen, in that trade or industry, which is connected with the employment or non-employment or the terms of the employment, or with the conditions of labour, of persons in that trade or industry ; and

(*b*) Without prejudice to the generality of the expression " trade or industry," workmen shall be deemed to be within the same trade or industry if their wages or conditions of employment are determined in accordance with the conclusions of the same joint industrial council, conciliation board or other similar body, or in accordance with agreements made with the same employer or group of employers.

" *Strike* " *and* " *Lock-out.*"—Section 8 (2) of the Act of 1927 enacts that :

For the purposes of this Act :

(*a*) The expression " strike " means the cessation of work by a body of persons employed in any trade or industry acting in combination, or a concerted refusal, or a refusal under a common understanding of any number of persons who are, or have been so employed, to continue to work or to accept employment ;

(*b*) The expression " lock-out " means the closing of a place of employment or the suspension of work, or the refusal by an employer to continue to employ any number of persons employed by him in consequence of a dispute, done with a view to compelling those persons, or to aid another

employer in compelling persons employed by him, to accept terms or conditions of or affecting employment.[1]

Where the courts have tried to define these terms, the definitions have usually been too narrow or too indefinite. The following are some attempts: "A strike is properly defined as a 'simultaneous cessation of work on the part of the workmen.'"[2] "I conceive the word means a refusal by the whole body of workmen to work for their employers, in consequence of either a refusal by the employers of the workmen's demand for an increase, or of a refusal by the workmen to accept a diminution of wages when proposed by their employers."[3] It is nearer the truth to say that the word "strike" is of an artificial character and does not represent any legal definition or description.[4] The circumstances which, by general consent, are deemed to constitute a strike or lock-out vary from decade to decade, and there may be danger in framing a rigid definition. The definitions in the Act of 1927 are definitions only for the purposes of that Act.

The words "or to aid another employer in compelling persons employed by him" seem to refer to a sympathetic lock-out. The definition of a "strike," which is more generally worded, seems to cover a cessation of work in combination, or a concerted refusal to work, in sympathy with or in support of persons employed by another employer, or employed in another trade or industry. A concerted refusal, or refusal under a common understanding, by persons who have been employed in any trade or industry, to accept employment, will be a "strike"; whereas a refusal by an employer to employ persons not hitherto employed by him does not appear to come within the terms of the definition of a "lock-out."

It may be assumed that a "lock-out," which is declared in support of another employer, will usually involve an actual "closing of a place of employment." But where an employer gives notice of an

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[1] In only one other statute have these expressions been defined. In the Munitions of War Act, 1915, 5 & 6 Geo. 5, c. 54, the definition of a "lock-out" is the same as that in s. 8 (2) (*b*). But the definition of a "strike" is as follows:

> The expression "strike" means the cessation of work by a body of persons employed acting in combination, or a concerted refusal or a refusal under a common understanding of any number of persons employed to continue to work for an employer in consequence of a dispute, done as a means of compelling their employer or any person or body of persons employed, or to aid any other workmen in compelling their employer or any person or body of persons employed, to accept or not to accept terms or conditions of or affecting employment.

[2] *Farrer* v. *Close*, 1869, 4 Q. B., at p. 612.

[3] *King* v. *Parker*, 1876, 34 L. T., at p. 889, *per* Kelly, C. B.

[4] *Denaby and Cadeby Main Collieries, Ltd.* v. *Yorks. Miners' Association*, 1906, A. C., at p. 405, *per* Lord James.

alteration of terms or conditions, workmen who are prepared to work on those terms are generally free to continue to work, while those who refuse to accept desist from working. Here there is not a complete "suspension of work" or "closing of a place of employment," but one may surmise that there may be a "refusal" by the employer "to continue to employ . . . persons employed by him in consequence of a dispute"; he declines to employ them except on the new terms. Often, in such cases, where the workmen decide in concert not to accept the terms, it would seem that there may be both a strike and a lock-out.

Section 8 (2) (*c*) of the 1927 Act provides that for the purposes of that Act:

> a strike or lock-out shall not be deemed to be calculated to coerce the Government unless such coercion ought reasonably to be expected as a consequence thereof.

There is some difference of opinion as to whether the word "calculated" signifies "capable of producing and likely to produce a certain result," or whether it does not involve a certain element of design or intention. Section 8 (2) (*c*) does much to clarify the meaning of the term. Still, the duty of exercising reasonable foresight concerning the likely consequences of a strike or lock-out is no light one at a time of crisis.

"*Trade or industry.*"—The expression "a trade dispute within a trade or industry" is defined in Section 1 (1).[1] This sub-section also provides that:

> without prejudice to the generality of the expression "trade or industry" workmen shall be deemed to be within the same trade or industry if their wages or conditions of employment are determined in accordance with the conclusions of the same joint industrial council, conciliation board or other similar body, or in accordance with agreements made with the same employer or group of employers.

Much difficulty is likely to arise in defining the boundaries of most trades and industries, especially when no joint industrial council, conciliation board or similar body exists, or when the area of operation of such body is not precisely ascertained.

It has been seen that a strike or lock-out will be illegal under Section 1 (1) if:

(*a*) it has any object other than, or in addition to, the furtherance of a trade dispute within the trade or industry in which the strikers or the employers locking-out are engaged; and

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[1] Cf. wording of s. 5 (3) of the Act of 1906.

(*b*) it is a strike or lock-out designed or calculated to coerce the Government either directly or by inflicting hardship upon the community.

A strike or lock-out will fulfil the first condition, unless its sole object is the furtherance of a trade dispute within the trade or industry in which the strikers or the employers locking-out are engaged. A sympathetic strike or lock-out in one trade or industry, in furtherance of a trade dispute in another trade or industry or a section thereof, will clearly fulfil the first condition of an illegal strike or lock-out.

It is possible that a strike designed to coerce the Government directly, or even by inflicting hardship on the community, would, on this ground alone, be held to have some object other than the furtherance of a trade dispute within the trade or industry in which the strikers were engaged, so as to satisfy the first as well as the second condition of illegality, even though the strike was also, in some way, in furtherance of a trade dispute of that kind. If a strike of this kind be held illegal, this will constitute a case in which a strike may be illegal though not more than one trade or industry is involved.

In view of Section 8 (2) (*c*) the words "calculated to coerce the Government" cannot fairly mean that the strike must be reasonably likely to force or compel the Government to grant, or bring pressure to bear on others to grant, the demands of the strikers. They seem to signify that the strike must be such as might reasonably be expected, by those bringing it about, to force the Government to intervene and take some step, which otherwise it would not have taken, as by passing some statute or negotiating with the other party to the dispute. There seems to be nothing in Section 1 to prevent proceedings being taken against strikers under Section 1 (1), where, during the continuance of a strike, conditions satisfying that subsection arise, although, at the time of its commencement, the Government had no reason for believing that the strike was calculated to coerce the Government. Probably the section is primarily intended to check such strikes at their inception, but the character of a strike so often alters during its continuance that the section will lose much of its effect if it is construed in the narrower way.

Section 1 (1) declares that it is illegal to commence, or continue, or to apply any sums in furtherance or support of, any strike or lock-out which is declared to be illegal. This seems to render illegal the act of any person who leaves work or stays away from work in such a strike, as well as the act of a person who is responsible for the calling of the strike, but Section 1 proceeds to exempt the former type of act from liability. Section 1 (2) provides that :

If any person declares, instigates, incites others to take part in or otherwise acts in furtherance of a strike or lock-out, declared by this Act to be illegal, he shall be liable on summary conviction to a fine not exceeding ten pounds or to imprisonment for a term not exceeding three months, or on conviction on indictment to imprisonment for a term not exceeding two years :

Provided that no person shall be deemed to have committed an offence under this section or at common law by reason only of his having ceased work or refused to continue to work or to accept employment.

There is a similar proviso to Section 1 (4) that :

no person shall be deemed to have committed an offence under any regulations made under the Emergency Powers Act, 1920, by reason only of his having ceased work or having refused to continue to work or to accept employment.

It remains to be seen whether the courts will hold that these provisos afford no protection to a person who, in combination with other persons, ceases work, or refuses to continue to work or to accept employment. To be liable, a person must, apparently, be guilty of any of the acts named in Section 1 (2).

Section 1 (3) provides that :

Where any person is charged before any court with an offence under this section, no further proceedings in respect thereof shall be taken against him without the consent of the Attorney-General except such as the court may think necessary by remand (whether in custody or on bail) or otherwise to secure the safe custody of the person charged, but this subsection shall not apply to Scotland, or to any prosecution instituted by or on behalf of the Director of Public Prosecutions.

Section 2 of the Act of 1927, which was framed for the protection of persons who refuse to take part in illegal strikes or lock-outs, has already been referred to.[1] It may be noted here that Section 2 (3) enacts that " as respects any strike or lock-out before the passing of this Act but since the first day of May, 1926, which, according to the law as declared by this Act, was illegal, this section shall have effect as if it had been in operation when the strike or lock-out took place." This provision was intended to afford the protection of Section 2 to persons who had refused to take part in the " General Strike " of 1926. It seems to imply that the " General Strike " was a strike of the kind declared illegal by Section 1.

Finally, Section 7 of the Act of 1927 provides that :

Without prejudice to the right of any person having a sufficient interest in the relief sought to sue or apply for an injunction to restrain any applica-

[1] *Ante*, p. 89, *National Sailors' and Firemen's Union* v. *Reed*, 1926, Ch. 536.

> tion of the funds of a trade union in contravention of the provisions of this Act, an injunction restraining any application of the funds of a trade union in contravention of the provisions of section one of this Act may be granted at the suit or upon the application of the Attorney-General.

The object of this provision is to enable the Government of the day, through the Attorney-General, to ascertain, in a suit for an interlocutory injunction, whether a strike, in progress or imminent, is or is not illegal, and whether trade union funds can legally be devoted to its support.

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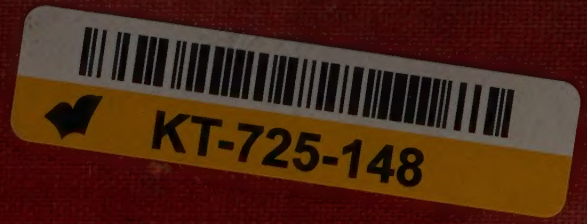
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